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No. 86

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

October Term, 1986

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT**

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QUESTION PRESENTED

Whether a state appellate court may reverse a criminal conviction on the ground of evidentiary insufficiency, thereby invoking the United States Constitution's Fifth Amendment double jeopardy clause bar against retrial, where the evidence is legally sufficient to sustain the conviction under the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution?

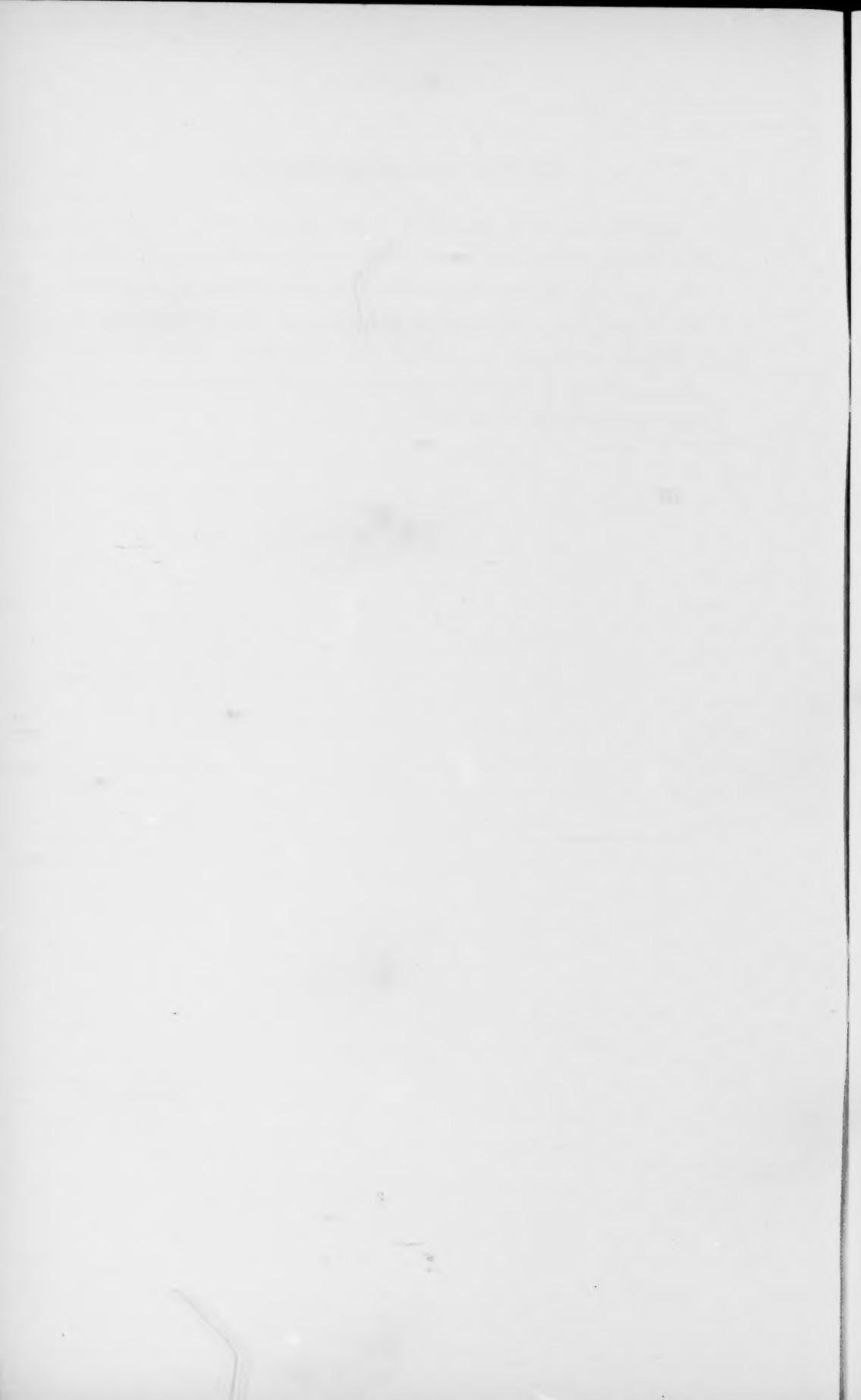


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**PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT**

The Hennepin County Attorney, on behalf of the State of Minnesota, respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court entered in this proceeding on August 29, 1986.

OPINIONS BELOW

The original opinion of the Minnesota Supreme Court, reproduced and attached hereto as Appendix B, is unreported. The order and substituted opinion of the Minnesota Supreme Court, reproduced and attached hereto as Appendix A, is reported at 392 N.W.2d 876 (Minn. 1986). The order and memorandum of the trial court, reproduced and attached hereto as Appendix C, is unreported.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court was entered on August 29, 1986. This petition for a writ of certiorari was filed within sixty days of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1982).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution:

... [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . .

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

... [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

Minnesota Statute §609.185(1)(3) (1981):

MURDER IN THE FIRST DEGREE.

Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:

(1) Causes the death of a human being with pre-meditation and with intent to effect the death of the person or of another;

* * *

(3) Causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit . . . arson in the first or second degree . . .

* * *

STATEMENT OF THE CASE

On November 12, 1983, a Hennepin County District Court jury convicted respondent Orville Berndt, Jr., of eight counts of Murder in the First Degree for the arson deaths of his wife, his son and his two stepsons. In a post trial appeal, the Minnesota Supreme Court reversed all eight murder convictions on the ground that the evidence was insufficient to sustain the convictions (App. B2). The State of Minnesota filed a petition for rehearing on the grounds that essential evidentiary exhibits were never delivered to or examined by the Minnesota Supreme Court and that the opinion contained numerous factual errors and overlooked important arson expert testimony (App. I). Five months later the Minnesota Supreme Court withdrew its original opinion and substituted for it an opinion that was identical to the original with the exception of one factual correction (App. A).¹ It also denied the State of Minnesota's motions requesting that the court examine the undelivered evidentiary exhibits (App. A). The circumstances leading to respondent's eight murder convictions are as follows.

Shortly before 3:00 a.m. on August 21, 1981, a townhouse unit in the city of Brooklyn Center, Minnesota, became en-

¹ Respondent was discharged from prison the date the original judgment was filed. The Minnesota Supreme Court held in a previous decision that when it has found that the evidence is insufficient to sustain a conviction, the double jeopardy clause as it was interpreted in *Burks v. United States*, 437 U.S. 1 (1978) bars a new trial. See *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979). The entry of a substituted judgment by the Minnesota Supreme Court following the petition for rehearing is therefore a final judgment within the meaning of 28 U.S.C. §1257(3) (1982).

gulfed in flames.² Neighbors and police officers arriving on the scene saw respondent standing in front of the burning building. No one observed respondent either in or coming out of the burning building.³ While respondent stood outside, two neighbors made unsuccessful attempts to enter the townhouse unit to rescue respondent's family. Firemen brought the fire under control by 3:34 a.m. Respondent yelled obscenities at the firemen as they fought the fire. In an effort to locate and rescue the victims, a police officer approached respondent and asked where in the townhouse respondent's family members were located. Respondent refused to cooperate and threatened to strike the police officer. Once the fire was under control, firemen entered the townhouse and looked for victims. The charred body of respondent's wife, Brenda Berndt, was found on the floor of the dining room with her legs and feet going through the doorway into the kitchen. On the second floor the body of respondent's 14 year old stepson Richard Gage was found face down on the floor in the front bedroom. The bodies of respondent's 10 year old stepson Michael Gage and of respondent's 4 year old son Corey Berndt were found on the floor in the second bedroom on the second floor. Corey's body was

² The transcripts of the pretrial, trial and post trial proceedings in this case total approximately 3,000 pages. Over half of the trial testimony and post trial testimony (approximately 1400 pages) consisted of testimony by witnesses experienced in the area of fires, arson investigation and gas chromatography. The extremely important parts of the record will be referenced to in this petition and will either be quoted in the petition or reproduced in the appendix.

³ Respondent's next door neighbor stated that it "seemed" to him that respondent came out of his townhouse at the same time the neighbor ran out of his own townhouse. But the neighbor admitted that he never actually saw respondent come out the door of the burning building.

on its back with Michael's body partially on top of it. Except for slight singeing of his eyelashes and arm hair on the left side of his body, respondent was uninjured by the fire.

The fire had spread rapidly and engulfed the townhouse in a very short period of time. Police Officer Robert Adams was conducting a traffic stop across the street from the townhouse complex at approximately 2:45 a.m. When he left the area at 2:48 a.m., the area was very quiet and there was no sign of fire or smoke. Officer Adams had driven only a few blocks from the townhouse complex when he received a dispatcher call about a fire. He immediately returned to the townhouse complex and arrived there at 2:54 a.m., just six minutes after he had left the area. As he arrived, he saw that the townhouse was engulfed in fire with flames coming out of every window on both the upstairs and downstairs with the exception of the front window on the second floor. Another officer observed that only the first floor was in flames when she arrived but the second floor burst into flames within thirty seconds to a minute after her arrival. The townhouse was totally engulfed in flames when the first fire truck arrived at the scene at 2:56 a.m. The neighbors concurred that the townhouse became totally engulfed in flames within a very short period of time. It was the worst residential fire ever observed by the firemen at the scene.

A fire inspection team began investigating the fire scene a few hours after the fire had been extinguished. The inspection of the fire scene took a total of three days over a four-day period. The fire scene was under 24 hour police protection from the time of the fire until the completion of the inspection. The team included Brooklyn Center Fire Marshal Jerry Pedlar, a trained arson investigator who had investigated over 200 fires. It also included Ward Mahlen, a trained arson spe-

cialist from the Hennepin County Sheriff's Office. Other team members included the state fire marshal.

The first and second level of the two-story townhouse had been almost completely destroyed by the fire. Multiple classic signs of an arson fire ignited by a flammable liquid were found in the townhouse.⁴ There were numerous low burn patterns that could only be explained by the presence of a liquid accelerant.⁵ Trailer patterns, which are burn patterns consistent with the use of an accelerant to guide a fire along, were also present in the townhouse. The trailer patterns were sixty feet in length with widths varying from three inches to two feet. The trailers were found in the kitchen, led into the dining room with a heavy burn area concentrated around Brenda Berndt's body and extended into the living room. A trailer pattern led from the living room, covered the hallway by the stairs and led to the front entryway. Trailers were also found on the stairway. Heavy concentrations of low burn with heavy charring were found at the entrance of each of the upstairs bedrooms where the young boys had been trapped. All of these burn patterns were consistent with the pouring of a flammable liquid and could *not* be explained by any other cause.

⁴ The physical evidence showing that the fire was arson was set forth in exhaustive detail during the testimony of Mr. Pedlar and Mr. Mahlen at trial (Trial transcript 347-505, 710-864). Photographs and videotapes of this physical evidence were admitted as evidentiary exhibits at trial.

⁵ The locations of the suspicious burn patterns, the victims' bodies and the areas from where positive samples of gasoline were taken were depicted at trial on two diagrams that were admitted into evidence as State's Exhibits Nos. 18 and 19 (App. F and App. G). These exhibits were used throughout the trial to explain the testimony of the arson experts. The markings on these two exhibits were explained during the testimony of Ward Mahlen (App. J12-18). These exhibits were never examined by the Minnesota Supreme Court.

Numerous samples taken from the fire scene were tested by the use of gas chromatography for the presence of an accelerant.⁶ Five samples were found to contain gasoline. These five samples came from the front door entryway, the kitchen windowsill, the living room area by the sofa, the stairway and the suspicious low burn patterns at the entrance of the bedroom where two of the boys were trapped.

Examination of the fuse box, circuits, electrical outlets, switches and appliances ruled out all electrical causes for the fire. No accidental cause for the fire could be found.

The inspection team did not find any empty non-combustible gasoline containers at the fire scene.⁷ A half empty gasoline container was found in the caretaker's garage unit. Respondent shared this unit with the caretaker and had a key to it. Another half empty gasoline container was found in another garage at the townhouse complex. The caretaker assumed that the men working the grounds had used the missing gasoline but he did not know for certain that the gasoline had been used by the groundskeepers. Both half empty gasoline containers were next to garbage dumpsters. The inspection team found both dumpsters to be empty. Garbage collectors had emptied the dumpsters between the time of the fire and the time the inspection began a few hours later. Numerous cars were parked near the townhouse, including the respondent's car. Respondent knew how to siphon gas from a car.

Respondent made statements to the police on three separate occasions as to how the fire started. The first statement was

⁶ A liquid accelerant is normally totally consumed by the fire. Samples were taken from areas where some of the accelerant may have been protected from the flames, such as under a plate or under a tile.

⁷ The fire scene was littered with debris of melted, unidentifiable combustible materials.

made in an interview at police headquarters at approximately 7:00 a.m. on the morning of the fire. Respondent was given his Miranda rights and was told that, due to the rapid fire spread, the police suspected that the fire may have been caused by arson. He was also informed that he was a possible suspect. Respondent told the police that there were no problems with his marriage and that his wife had a life insurance policy through her employer. He stated that he and his wife had been to several bars the evening of the fire and that he had been driving. They arrived home at approximately 1:00 a.m., whereupon his wife went upstairs to bed. He made himself dinner and ate it on the sofa. He admitted he had disconnected the smoke alarm earlier that evening so that it would not go off when the boys made pizza. He claimed he fell asleep on the couch in the living room. When he woke up, he saw a fire in the dining room area up near the ceiling between the kitchen and dining room. Upon seeing the fire, he jumped off the couch, ran through the living room past the stairway, through the hallway and out the front door. He did not mention anything about seeing his wife at the time of the fire nor did he indicate he made any effort to rescue his family. Respondent did not complain of any injuries. The police did not confiscate his clothing. Later that day respondent learned that his wife's body had been found in the dining room on the first floor.

On August 27, 1981, six days after the fire, respondent was again interviewed by the police. At this time he related the same story about the fire and again did not mention seeing his wife during the fire. A third interview took place on October 6, 1981, approximately six weeks after the fire. The police told respondent that tests revealed that gasoline residue had been found in the fire scene samples and that he was their

only suspect at that time. Respondent then, *for the first time*, told the police that he now thought it was possible that his wife had fallen asleep on the couch with him. He claimed she woke up to the fire, said "Oh my God" and ran into the dining room towards the fire. When the police told him that they thought it would have been impossible for him to escape in the way he claimed he did without suffering injury, respondent claimed that the bottoms of his feet had turned brown and peeled off about a week after the fire. He never had his feet examined by a doctor. Respondent also suggested to the police that his caretaker may be a possible suspect.

The inspection team findings were reviewed and confirmed by independent arson experts and the police conducted an investigation into both respondent's relationship with his wife and respondent's financial status. Following this investigation, the Hennepin County Grand Jury returned an indictment on August 17, 1982, charging respondent with four counts of Murder in the First Degree in violation of Minn. Stat. §609.185 (1) (1981) (intentional and premeditated murder) and with four counts of Murder in the First Degree in violation of Minn. Stat. §609.185(3) (1981) (intentional murder by arson) for the deaths of his wife, his son and his two stepsons. Respondent remained free on bail until the time of his conviction.

Respondent's jury trial commenced on October 20, 1983, and lasted approximately four weeks. The prosecution presented testimony by witnesses present at the fire scene as well as by several arson experts.

Ward Mahlen, the arson specialist from the Hennepin County Sheriff's Office, testified as to the physical findings at the fire scene. During his testimony, diagrams depicting the location of the bodies, the most severe suspicious burn patterns and the location from where the positive gasoline findings

were found were admitted into evidence as State's Exhibits Nos. 18 and 19 (App. F, App. G). He testified that there was no indication of any electrical cause for the fire and stated that he saw "no way that the fire could have been started and burned in any natural or accidental manner" (App. J19-20). He noted that several distinct burn patterns were present in the townhouse that could only result from the use of a liquid accelerant. These patterns included: the deep scarring and rutting pattern in the dining and living room (App. J1-4); the irregular bubbling burn pattern on the kitchen tile (App. J9-10) and kitchen windowsill (App. J7-8); the burn pattern on the kitchen table indicating that the fire burned from the top down (App. J5-6); and the burn pattern through the tread of the stairs to the underside (App. J10-12).

Brooklyn Center Fire Marshal Jerry Pedlar also testified as to his findings and expert conclusions. Mr. Pedlar testified that based upon the numerous burn patterns that could only be accounted for by the presence of a liquid accelerant, the rapid acceleration of the fire and the finding of gasoline in five separate parts of the townhouse, it was his professional opinion that the "fire was started as a result of flammable liquids" (App. K6-7). He further stated that this would still be his opinion even if the fire samples had not tested positive for gasoline (App. K8-9). He testified that once the fire was ignited, it would have been impossible for respondent to have run from the living room to the front door without being seriously injured by the fire (App. K7). Mr. Pedlar explained that gasoline is "highly volatile" and that "once ignition has been made of the area . . . you get an automatic ignition of the fumes throughout the area" (App. K1-2, K8). He also ruled out the possibility that the fire was caused by an electrical problem (App. K2-5).

Two additional arson experts testified for the prosecution at trial. Both experts had reviewed the reports, photographs and videotapes of the fire scene. The first expert was James Carlson, a trained arson investigator who was self employed as an arson consultant. Mr. Carlson had been a member of the Minneapolis Fire Department for thirty years. For twelve of those years he worked as a fire investigator and he was Chief Investigator for an additional five years. Mr. Carlson testified that based upon his review of the fire scene materials, it was his professional opinion that the fire was "an arson fire" that "was ignited by hand by the use of flammable liquid, gasoline" (App. L3). He noted that the deep scarring and rutting in the dining and living rooms could only be explained by the presence of a flammable liquid (App. L6-7). He also concurred with Mr. Pedlar's opinion that it would have been impossible for respondent to run from the living room to the front door without being "severely harmed" (App. L3). He explained that ignition of a fire in an area with gasoline results in "immediate ignition of the entire room" and that this is a "rapid ignition that happens within a fraction of a second, resulting in a fire" (App. L1-2).

Mr. Carlson determined that the investigation conducted "relative to electrical cause" was "totally sufficient" (App. L8). He testified that electrical fires are slow burning and are not consistent with the speed with which this fire spread through the house (App. L4-5). He also testified that fires started by a careless cigarette are also slow moving and are inconsistent with the rapid fire spread (App. L7-8). He noted that if the fire had been caused by a cigarette in the carpet, it would have required the cigarette to smolder for one and a half hours before ignition. If that had happened,

persons on the first floor would have died from asphyxiation before ignition due to the high level of carbon monoxide (App. L6-7).

The other arson expert was Sharadchandra Bhatt, an engineer with a Master of Science Degree. He was experienced in both testing and investigating the use of accelerants in fires (App. M1). He estimated that the presence of five gallons of gasoline on the first floor would have been sufficient to cause the fire (App. M1-2). Mr. Bhatt concurred with Mr. Pedlar's opinion that ignition of an area containing gasoline would result in the instantaneous combustion of all gasoline fumes (App. M3). He testified that under these conditions, it would not be possible for there to be an isolated fire on the first floor for any significant period of time (App. M3-4). Mr. Bhatt testified that the burn patterns found in the living room could only have been caused by gasoline or some other flammable liquid (App. M5-6). In his professional opinion, the rapid spread of the fire was inconsistent with an electrical fire and consistent with a gasoline fire (App. M4-5).

The fire scene samples had been tested by Richard E. Tontarski, a forensic scientist employed by the United States Bureau of Alcohol, Tobacco and Firearms (ATF) at the National Laboratory Center in Rockville, Maryland. Mr. Tontarski had a Bachelor's Degree in Foreign Affairs, had completed the necessary college course work to be a chemist and had received a Master's Degree in Forensic Science from George Washington University in 1978. He had worked as a scientist for the ATF since 1978 and at the time of trial had analyzed fire scene samples for approximately 300 to 400 arson cases. He explained his testing technique and testified that he made a *positive* identification of gasoline in the chromatograms from five of the fire scene samples (App. N1-4).

There was testimony that neither the fire scene nor respondent smelled like gasoline on the night of the fire. Both the fire scene and respondent did smell of smoke. Experienced fire fighters and arson experts testified that once a gasoline fire is ignited, the gasoline smell is often masked by other fire smells such as smoke and that it is not unusual to *not* smell gasoline either at the fire scene or on the person who poured the gasoline (App. K5-6, K9-10, K10-11, App. L5, App. O1-4). Even the defense's arson expert conceded that other smells such as smoke may "override" gasoline odors (App. O5).

Medical testimony showed that the three boys died of carbon monoxide poisoning. Because a low level of carbon monoxide was found in Brenda Berndt's lungs, her death was attributed to a "superheated death." "Superheated death" occurs when there is an instantaneous combustion, or a very hot fire. The victim breathes in extremely hot air which damages the lungs and causes death before a lethal level of carbon monoxide can be absorbed by the lungs. Brenda Berndt's blood alcohol content at the time of death was .25 grams, indicating a high level of intoxication. Her scalp was extremely damaged by the fire. The medical examiner was able to determine that she had not suffered any major head injury before her death but could not rule out the possibility of a lesser blow to her head or face. Medical testimony also established that on the basis of a blood sample taken from respondent several hours after the fire, his blood alcohol content at the time of the fire could at the most have been .12 or .13 grams.

Testimony at trial showed that Brenda Berndt had a \$15,000 life insurance policy that had a double indemnity benefit worth \$30,000 if she died accidentally. Although the policy did not specify a beneficiary, respondent as her spouse had first priority as her beneficiary. After his wife's death, respondent filed a claim for this \$30,000 benefit. Evidence also

showed that Respondent had bought a new used car just before the fire. The loan for the car was insured for \$3,900 and the policy carried a life insurance provision which provided that the loan would be retired upon the death of either Brenda Berndt or respondent. After Brenda Berndt's death, the loan was automatically retired. At the time of the fire, the gas to respondent's townhouse had been turned off because respondent had not paid his utility bill. Respondent was also one month behind in paying the rent on his townhouse unit.

Witnesses testified that there had been major problems with promiscuity throughout respondent's seven-year relationship with his wife. Respondent had made repeated sexual advances towards his wife's sister and engaged in at least three extra-marital sexual affairs during his marriage. He once physically accosted a thirteen year old babysitter. Although respondent claimed at trial that he and his wife had worked everything out a year prior to the fire, *significant* evidence rebutted this claim. Testimony showed that Brenda Berndt had a sexual affair with a mutual acquaintance several months before her death. Two months before his wife's death, respondent grabbed the breasts of another woman in the presence of his wife. Also, shortly before his wife's death, respondent asked a friend to participate in "wife swapping."

Respondent admitted during his testimony that it was unlikely that somebody else broke into the house and poured gasoline throughout the first floor while he was sleeping on the couch. Instead, his defense was premised upon the contention that the fire could have been the result of accidental causes. He presented two expert witnesses in support of this theory.⁸ The defense's expert on gas chromatography testified

⁸ Significant flaws undermining the credibility of both experts' opinions were revealed at trial. These flaws are set forth in detail in the prosecution's petition for rehearing (App. I32-34, I36-38).

that he disagreed with Mr. Tontarski's opinion that the chromatograms from the five fire scene samples showed the presence of gasoline. The defense's arson expert testified that he believed there were three possible accidental causes for the fire but on cross examination he abruptly *abandoned* two of these three theories. His only remaining theory was that a smoldering cigarette could have caused the accumulation of gases and ignited a "flashback" fire.

Bruce Ryden, Fire Marshal for the Roseville Fire Department, testified as a rebuttal witness for the prosecution. He testified that the carbon monoxide buildup necessary for a flashback fire would have caused the deaths of the occupants on the first floor (respondent and respondent's wife) before the gases reached their ignition point (App. P1-3).⁹

The trial court properly instructed the jury on reasonable doubt, circumstantial evidence and the evaluation of expert testimony. Twenty-nine hours later, the jury returned with verdicts finding respondent guilty as charged on all eight counts of Murder in the First Degree. The trial court sentenced respondent to concurrent mandatory sentences of life imprisonment on four of the convicted counts and the remaining four murder convictions were merged. Respondent filed a motion for new trial and for a judgment of acquittal. On August 1, 1984, the trial court denied both motions.

Respondent appealed his convictions to the Minnesota Supreme Court and filed his brief on May 1, 1985. Respondent

⁹ The fact that respondent, who claimed he was inside the townhouse, survived the fire and the fact that Brenda Berndt died from exposure to a hot fast fire rather than from carbon monoxide poisoning contradicts the defense's theory of a flashback fire.

asked the supreme court to depart from its usual standard of viewing the evidence in the light most favorable to the jury's verdict. He urged the Minnesota Supreme Court to disregard most of the testimony that was favorable to the verdict.

On March 21, 1986, the Minnesota Supreme Court filed a decision reversing respondent's conviction on the ground of insufficient evidence. The Minnesota Supreme Court declined to view the evidence in the light most favorable to the jury's verdict and concluded that the evidence did not satisfy the circumstantial evidence standard on appeal. It stated that:

The state produced evidence which, if credited by the jury, would sustain its contention that the townhouse fire had been ignited with the use of a gasoline accelerant. . . . Some circumstances proved were consistent with the state's claim of an intentional fire, but other circumstances proved were generally consistent with the rational hypothesis that the defendant was not guilty.

State v. Berndt, 392 N.W.2d 876, 881 (Minn. 1986) (App. B10-11). The opinion did not explain what rational hypothesis was consistent with respondent's innocence.

The State of Minnesota filed a petition for rehearing asking the Minnesota Supreme Court to reconsider its decision. In this petition the prosecution noted that the opinion contained numerous factual errors and consistently ignored and omitted essential testimony by the prosecution's arson experts.¹⁰ In preparing its petition, the prosecution learned that certain essential evidentiary exhibits were never sent to or examined

¹⁰ The important factual errors and omissions are set forth in detail in the petition for rehearing (App. I5-20).

by the Minnesota Supreme Court (App. D).¹¹ With its petition, the prosecution filed a motion requesting that these essential evidentiary exhibits be delivered to the Minnesota Supreme Court. The prosecution also had State's Exhibits Nos. 18 and 19 (two of the undelivered exhibits) reproduced and sent fourteen copies of these reproductions with a motion requesting that the Minnesota Supreme Court accept and examine these exhibits (App. E).

The petition noted that the Minnesota Supreme Court departed from its usual standard of viewing the evidence in the light most favorable to the jury verdict and that it had instead re-weighed the evidence. The prosecution requested that the supreme court reinstate the convictions and, in the alternative, remand the case for a new trial pursuant to this Court's decision in *Tibbs v. Florida*, 451 U.S. 31 (1982). The prosecution further informed the Minnesota Supreme Court that a new trial would not result in a retrying of the same evidence since new evidence supporting respondent's guilt had come to light since his original conviction. This new evidence included: (1) respondent's confession of the murders to a

¹¹ The clerk of the district court is required by Minn.R.Civ.App.P. 111.01 to send to the appellate courts all evidentiary exhibits that are in the possession of the district court. Although respondent in his response to the petition for rehearing claimed that it was the prosecution's duty to transmit the exhibits, this is not correct. Parties are only responsible for making arrangements to transmit exhibits when those exhibits are in the possession of the party. See Minn.R.Civ.App.P. 111.01. Also, the prosecution had been told by the district court clerk's office in June, 1985, that the office was preparing the exhibits for transmission to the appellate court (App. D4-5).

fellow inmate in April, 1985;¹² and (2) the initiation of disciplinary actions by the International Association of Arson Investigators against the defense arson expert Shelby Gallien as a result of his testimony at respondent's trial (App. H1-7).¹³

Respondent filed a response in opposition to the prosecution's petition for rehearing. This response conceded that the opinion contained numerous factual errors. It also implicitly conceded that the supreme court, in finding that the evidence was insufficient, rejected the prosecution's expert testimony establishing that the fire was caused by the use of a gasoline accelerant.

On August 29, 1986, the Minnesota Supreme Court entered an order withdrawing its original opinion and replacing it with a new opinion. This new opinion was identical to the original opinion except that it corrected one of the numerous factual errors contained in the original decision (App. A). This order also denied both the prosecution's motion for an order directing the delivery of the trial evidentiary exhibits to the appellate court and its motion to accept the reproductions of State's Exhibits Nos. 18 and 19 (App. A).

¹² The name of this inmate and the circumstances concerning respondent's confession are set forth in affidavits and a statement which was submitted to the Minnesota Supreme Court in a confidential appendix. This inmate is still incarcerated and fears that other inmates may take retaliatory actions against him if his identity becomes public. To minimize the risk to the inmate's safety, the prosecution has not referred to this inmate by name in non-confidential court documents.

¹³ Documents pertaining to these disciplinary proceedings were submitted to the Minnesota Supreme Court. These documents are reprinted in Appendix H.

REASONS FOR GRANTING THE WRIT

THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF BOTH THIS COURT AND FEDERAL CIRCUIT COURTS OF APPEALS AND HAS THEREBY EXTENDED THE MEANING OF "EVIDENTIARY INSUFFICIENCY" AND "DOUBLE JEOPARDY" BEYOND THE SCOPE OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The question presented herein is whether a state appellate court may reverse a criminal conviction on the ground of evidentiary insufficiency, thereby invoking the federal constitution's double jeopardy clause bar against retrial, where the evidence is legally sufficient to sustain the conviction under the due process clause of the Fifth and Fourteenth Amendments.¹⁴ Prior decisions by this Court have made the propriety

¹⁴ The judgment does not refer to the double jeopardy bar against retrial, but the Minnesota Supreme Court held in an earlier decision that *Burks v. United States*, 437 U.S. 1 (1978) bars retrial once it has ruled that the evidence was insufficient to sustain a criminal conviction. See *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979). In decisions prior to *Burks*, the Minnesota Supreme Court has authorized retrials in insufficient evidence cases. See e.g., *State v. Kaster*, 211 Minn. 199, 121-22, 300 N.W. 897, 899 (1941). The Minnesota Supreme Court has never held that the state constitution's double jeopardy clause, Minn. Const. art. 1, §7, affords a defendant greater protection against the possibility of retrial than that afforded by the federal constitution's double jeopardy clause. That it is the federal double jeopardy clause and not an independent state ground that bars retrial here if the judgment is not reversed is underscored by the Minnesota Supreme Court's decision in *State v. Fuller*, 374 N.W.2d 722 (Minn. 1985). In *Fuller*, the Minnesota Supreme Court explicitly declined to give a more expansive interpretation to the state constitution's double jeopardy clause than that given by this Court to the federal constitution's double jeopardy clause. *Id.* at 727.

of a state court's ruling on evidentiary sufficiency a matter of federal constitutional importance. In *Jackson v. Virginia*, 443 U.S. 307, *reh'g denied*, 444 U.S. 890 (1979), this Court held that a challenge to a state court conviction on the ground that the evidence was not sufficient to establish guilt beyond a reasonable doubt "states a federal constitutional claim." *Id.* at 322. In *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978), this Court held that the double jeopardy clause bars retrial when a defendant obtains an unreversed appellate ruling of evidentiary insufficiency from either a federal or state court. This double jeopardy ruling was premised upon this Court's standard of appellate review whereby a reviewing court must sustain a conviction if the evidence, viewed in the light most favorable to the prosecution, would warrant a jury finding the defendant guilty beyond a reasonable doubt. See *Burks*, 437 U.S. at 17. The Minnesota Supreme Court violated this standard of evidentiary review when it reversed respondent's conviction on insufficiency grounds and imposed a much more stringent standard of proof upon the prosecution than is required by the due process clause. Basic concepts of fairness inherent in the due process clause were also violated when the Minnesota Supreme Court reversed the murder convictions without viewing *all* of the evidence supporting guilt.

In holding in *Burks v. United States* that the double jeopardy clause barred retrial after a reversal based on evidentiary insufficiency, this Court explained that this holding was required by the fact that federal reviewing courts may only reverse on this ground when the prosecution's case "was so lacking that it should not have even been *submitted* to the jury." *Id.* at 16 (emphasis in original). Such rulings would be "confined to cases where the prosecution's failure is

clear." *Id.* at 17. In *Jackson v. Virginia*, this Court set forth in detail the following constitutional standard for reviewing the evidentiary sufficiency of a criminal conviction:

... [T]his inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby v. INS*, 385 U.S., at 282 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana*, 406 U.S., at 362. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Jackson, 443 U.S. at 318-19 (emphasis in original, footnotes omitted).

In *Greene v. Massey*, this Court held that the *Burks* double jeopardy rule was "fully applicable to state criminal proceedings." *Greene*, 437 U.S. at 24. In a concurring opinion, Mr. Chief Justice Rehnquist cautioned that the *Burks* rule may not be applicable to state insufficiency rulings that are based

upon a higher standard of proof than that required by the due process clause. Mr. Chief Justice Rehnquist explicitly stated:

. . . I would want to emphasize more than the Court does in its opinion the varying practices with respect to motions for new trial and other challenges to the sufficiency of the evidence both at the trial level and on appeal in the 50 different States in the Union. Thus, to the extent that . . . practice in this regard differs from practice in the federal system, the impact of the Double Jeopardy Clause may likewise differ with respect to a particular proceeding.

Greene, 437 U.S. at 27 (Rehnquist, J., concurring).

In *Tibbs v. Florida*, 457 U.S. 31 (1982), this Court held that even if a state court reversed a conviction on evidentiary grounds, the *Burks* double jeopardy rule does not bar retrial if the evidence was sufficient to satisfy the due process clause. Despite the fact that the evidence supporting the conviction in *Tibbs* "clearly satisfied the due process test of *Jackson v. Virginia*", *id.* at 45 n. 21, the Florida Supreme Court reversed the conviction because it had serious doubts as to the credibility of the prosecution's chief witness. See *id.* at 37-38. In affirming the Florida Supreme Court's order remanding the case for a new trial, Mme. Justice O'Connor stated that when an appellate court reverses a legally sufficient conviction on evidentiary grounds:

. . . [It] sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony
[A]n appellate court's disagreement with the jurors' weighing of the evidence does not require the special deference accorded verdicts of acquittal.

Id. at 42. Mme. Justice O'Connor further stated:

Just as the Double Jeopardy Clause does not require society to pay the high price of freeing every defendant whose first trial was tainted by prosecutorial error, it should not exact the price of immunity for every defendant who persuades an appellate panel to overturn an error-free conviction and give him a second chance at acquittal.

Id. at 44.

In *Tibbs*, the Florida Supreme Court conceded that the evidence was technically sufficient and that its evidentiary reversal was based upon its re-weighing of the evidence. See *id.* at 38. In contrast, the Minnesota Supreme Court has refused to acknowledge that the evidence was technically sufficient under the due process test and its ruling that the evidence was insufficient will bar retrial unless it is reversed. The issue before this Court, therefore, is whether a state appellate court may label a legally sufficient conviction as insufficient, thereby invoking the federal constitution's double jeopardy bar against retrial. Allowing a state court to do so is clearly contrary to the policies set forth by this Court in both *Burks* and *Tibbs*.

The evidence in this case is plainly sufficient to sustain a conviction under the *Jackson* due process test. Viewing the evidence in the light most favorable to the prosecution shows that several gallons of gasoline were spread throughout the first floor of the townhouse, on the stairway and at the entrance to the two second-story bedrooms where the boys were trapped. The gasoline covered the living room and hallway area and any fire would have ignited this area instantaneously. Because the physical evidence showed that respondent could not have run through this area as he claimed without

suffering severe injury, the jury could have rationally concluded that respondent lied about being inside the townhouse when the fire started. Respondent's presence outside the townhouse at the time the fire began, along with his impossible claim of being inside when it occurred, was sufficient to sustain the jury's finding beyond a reasonable doubt that respondent was the arsonist. Even respondent admitted that it was unlikely that someone else could have broken in and poured gasoline throughout the house without waking him as he slept on the living room couch.

By ruling that the evidence was legally insufficient, the Minnesota Supreme Court departed from the *Jackson* due process test of sufficiency as well as from its own traditional evidentiary test. The Minnesota Supreme Court violated this test in three ways: (1) it imposed a more stringent standard of review than required by the due process clause; (2) it viewed the evidence in the light most favorable to the defense; and (3) it refused to view *all* of the evidence showing guilt and erroneously construed many of the facts supporting guilt.

That the Minnesota Supreme Court's reversal was based on a standard more stringent than that required by the due process test is evident by its use of the following circumstantial evidence standard to justify its reversal:

The circumstantial evidence in a criminal case is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt.

State v. Berndt, 392 N.W.2d 876, 880 (Minn. 1986) (App. A10). In *Jackson v. Virginia* this Court explicitly rejected the contention that the due process clause required this standard of review. See *Jackson*, 443 U.S. at 326. See also *Holland v.*

United States, 348 U.S. 121, 140-41 (1954). The evidence need not negate every reasonable theory consistent with the defendant's innocence to sustain a criminal conviction under the *Jackson* due process test. *See Holland*, 348 U.S. at 138-41.

The evidence would have even satisfied this more stringent standard had the Minnesota Supreme Court not also violated the due process test's requirement that *the evidence must be viewed in the light most favorable to the prosecution*. This "was a classic case of conflicting evidence in which the jury had to pass on the credibility of the witnesses." *Anderson v. Fuller*, 455 U.S. 1028, 1031 (1982) (Burger, C.J., dissenting) (denial of petition for certiorari). The testimony of the prosecution's arson experts established that the fire was an act of arson committed with gasoline and that respondent's claim of being inside the house at the time of ignition was physically impossible. Two defense experts disputed the gasoline findings and theorized that the fire could have been caused by a smoldering cigarette. The jury's verdicts of guilty show that it did not believe the defense's experts and obviously accepted as true the testimony of the prosecution's experts. "It is sheer nonsense to suggest that, on this record, the 12 jurors acted irrationally." *Id.* at 1033. *See generally Hoffa v. United States*, 385 U.S. 293, 311 (1966), *reh'g denied*, 456 U.S. 940 (1967) ("established safeguards of the Anglo-American legal system leave the veracity of a witness to be . . . determined by a properly instructed jury").

That the Minnesota Supreme Court rejected the jury's determinations of credibility is demonstrated by the fact that the only circumstances that it could refer to as being inconsistent with respondent's guilt was the defense's theory that the fire was accidental. The logical corollary of this ruling is

that the prosecution can never prove arson beyond a reasonable doubt whenever the defense produces an expert with a theory of accidental fire—no matter how preposterous the theory.

The Minnesota Supreme Court's claim that even if it were to view the evidence in the light most favorable to the verdict, there was no evidence to show that respondent was the arsonist *flagrantly* overlooks the physical evidence and arson expert testimony. This evidence established that respondent could not have possibly been in the townhouse at the time the fire ignited and that he lied about being in this house. This justifies the rational conclusion that respondent was the arsonist. What other rational hypothesis is possible when the evidence is viewed in the light most favorable to the prosecution? It is not rational to conclude that respondent stood outside watching while someone else spread the gasoline and ignited the fire and then lied to the police to protect the arsonist who had murdered his family.

In relying upon the fact that there was no odor of gasoline detected at either the fire scene or on respondent's person to justify its insufficiency ruling, the Minnesota Supreme Court substituted its judgment not only for that of the jurors but also for that of the trained arson investigators who testified. By setting aside the jury verdicts on the basis of their non-expert opinions concerning the odor of gasoline at a fire, the justices of the Minnesota Supreme Court "acted like jurors, not jurists." *Anderson*, 455 U.S. at 1033 (Burger, C.J., dissenting).

Finally, the Minnesota Supreme Court violated the due process test when it adamantly refused to view all the evidence showing respondent's guilt. Evidentiary exhibits essential to the jury's acceptance of the prosecution's expert witnesses'

opinions were never delivered to or examined by the Minnesota Supreme Court. When this grievous oversight was pointed out by the prosecution on rehearing, the Minnesota Supreme Court explicitly refused to examine both the undelivered exhibits and the prosecution's reproduction of Exhibits Nos. 18 and 19, two of these undelivered exhibits. Examination of these exhibits was crucial to the jury's understanding and acceptance of the experts' testimony that respondent could not have escaped from the townhouse without suffering severe injury. Examination of the location of the burn patterns caused by the gasoline in the living room and hallway in Exhibit No. 18 demonstrates the absurdity of the Minnesota Supreme Court's conclusion that respondent could have escaped from the townhouse without incurring severe injury (App. F). Not only did the Minnesota Supreme Court refuse to examine essential evidentiary exhibits, the opinion shows that its ruling was based upon facts not supported by the record. Many of the facts contained in the decision are simply wrong. The opinion also consistently omits essential evidence supporting respondent's guilt.

Just as the affirmance of a conviction's evidentiary sufficiency by an appellate court that has not adequately reviewed all the evidence violates the due process test, a reversal on insufficiency grounds where the appellate court has not reviewed all the evidence equally offends the concept of due process. As Mr. Justice Cardozo once stated:

But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 122 (1934). Society has a vital interest in bringing to justice criminals who murder defenseless women and children while they sleep. This interest and the public's safety is unduly frustrated when an appellate court not only chooses to reverse a legally sufficient conviction but also incorrectly labels the grounds for reversal as that of "evidentiary insufficiency," thereby invoking the federal constitution's double jeopardy clause's bar against retrial.

It is clear that the propriety of a state court in ruling on the sufficiency of evidence in a criminal case is a proper matter for federal appellate review.¹⁵ In *Jackson v. Virginia* this Court reviewed and affirmed a state court's finding of sufficiency when a federal court misapplied the due process test of evidentiary sufficiency. See *Jackson*, *supra*. In *Tibbs v. Florida*, this Court independently examined the underlying trial record to determine whether the state appellate court's

¹⁵ Prosecution appeals of insufficiency rulings reversing a guilty verdict are not prohibited by the double jeopardy clause "[s]ince reversal on appeal would merely reinstate the jury's verdict." *United States v. Wilson*, 420 U.S. 332, 344-45 (1975) (government appeal of post-verdict dismissal of indictment). In *United States v. DiFrancesco*, 449 U.S. 117 (1980), this Court noted in dictum that "the Double Jeopardy Clause does not bar a Government appeal from a ruling in favor of a defendant after a guilty verdict has been entered by the trier of fact." *Id.* at 130. That appeal's of insufficiency rulings are also permissible was implied when the Court supported this dictum by citing two federal circuit court of appeals cases that held that the government can appeal post-verdict acquittals. See *United States v. Rojas*, 554 F.2d 938, 942 (9th Cir. 1977); *United States v. DeGarces*, 518 F.2d 1156, 1159 (2d Cir. 1975). Several other federal circuit courts of appeals have also explicitly held that the double jeopardy clause does not bar government appeals of post-verdict acquittals. See e.g., *United States v. Steed*, 674 F.2d 284, 285-86 (4th Cir.), *cert. denied*, 456 U.S. 909 (1982).

reversal was properly based on its re-weighing of the evidence rather than on legal insufficiency. *See Tibbs, supra.* Federal courts routinely examine state convictions to determine if state courts properly ruled that the evidence was legally sufficient. *See e.g., Scott v. Perini, 662 F.2d 428 (6th Cir. 1981), cert. denied, 456 U.S. 909 (1982).* The decision in this case should not escape constitutional review simply because the Minnesota Supreme Court, unlike the state appellate court in *Tibbs*, persisted in incorrectly labelling as insufficient a legally sufficient conviction.

The decision warrants consideration by this Court because the Minnesota Supreme Court has applied the standard of "evidentiary insufficiency" in a way that threatens to lead to reversals of state court criminal convictions and to the bestowing of the immunity afforded by the double jeopardy clause whenever a state court chooses to sit as a jury and set aside the lawful findings of fact. Unless a writ of certiorari is granted, Mr. Chief Justice Rehnquist's qualification in *Greene v. Massey* that the double jeopardy clause should only be applied to state insufficiency findings that are consistent with the federal standard for insufficiency will only be an empty admonishment and a defendant who was legally convicted of *four* heinous murders will be irrevocably set free.

CONCLUSION

For the foregoing reasons, the State of Minnesota respectfully prays that the petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court be granted.

Respectfully submitted,

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October 28, 1986.

No. 86

OCT 28 1986

JOSEPH F. SPANIOL, JR.
CLERKIN THE
Supreme Court of the United States

October Term, 1986

STATE OF MINNESOTA,*Petitioner,*

vs.

ORVILLE BERNDT, JR.,

Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

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APPENDIX

APPENDIX A

STATE OF MINNESOTA IN SUPREME COURT

C2-84-1661

STATE OF MINNESOTA,

Respondent,

vs.

ORVILLE BERNDT, JR.,

Appellant.

ORDER

The court, having considered en banc the State's petition for rehearing as well as four motions of the State in connection therewith,

IT IS ORDERED:

1. The original opinion in this case filed March 21, 1986 is hereby withdrawn.

2. The attached opinion which is identical to the original ~~with~~ one exception replaces the original. That exception is:

(a) The last three complete sentences on page 7 of the original slip opinion which read:

Appellant claimed he was unaware of his wife's life insurance policy furnished by the State of Minnesota where she was employed. He was not even a named beneficiary on this policy. Berndt was surprised to learn that the other policy would pay off a car loan.

are deleted and in their stead is inserted:

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Appellant was not named beneficiary on his wife's life insurance policy furnished as an automatic benefit by the State of Minnesota where she was employed. Berndt was surprised to learn that the other policy would pay off the car loan.

3. In all other respects, the petition of the State for rehearing is denied.

4. The four motions of the State entitled "Motion for Clarification of Conditions of Release," "Motion for Oral Argument on Petition for Rehearing," "Motion to Order Trial Court to Deliver Exhibits," and "Motion to Accept Photo Reproductions of State's Exhibits" are each denied.

5. No attorney fees incurred by either party in connection with the petition for rehearing and/or the supportive motions are allowed.

Dated: August 29, 1986.

By the Court:

GLENN E. KELLEY

Associate Justice

**STATE OF MINNESOTA
IN SUPREME COURT**

Hennepin County

Kelley, J.

C2-84-1661

STATE OF MINNESOTA,

Respondent,

vs.

ORVILLE BERNDT, JR.,

Appellant.

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Filed August 29, 1986. Wayne Tschimperle, Clerk of Appellate Courts.

SYLLABUS

State failed to meet its burden to establish the guilt of an accused, convicted of eight counts of first-degree murder, when the convictions rested on circumstantial evidence which was consistent with a rational hypothesis other than guilt.

Reversed.

Heard, considered and decided by the court en banc.

OPINION

Kelley, Justice.

Orville Berndt appeals from his conviction on eight counts of first degree murder arising out of the deaths of his wife, her two sons by a previous marriage, and the son of his wife and himself. All four perished in a fire in August 1981 at the family duplex home in Brooklyn Center. On appeal, Berndt claims that the evidence was insufficient to sustain the convictions.¹ We agree. Accordingly, we reverse.

On August 20, 1981, appellant Orville Berndt lived in a townhouse residence in Brooklyn Center with his wife, Brenda; their son, Corey, age 3-1/2; and Brenda's sons, Richard Gage, age 13; and Michael Gage, age 10. Early in the evening after work on August 20, Berndt and his wife went to consult with their automobile insurance agent to obtain insurance coverage on a recently acquired used car. After completing that business, the couple first visited two bars, and later ended up at the Earle Brown Bowl, ostensibly to celebrate the car purchase. They remained there, drinking beer

¹ In addition to raising the insufficiency of the evidence issue, appellant has alleged violation of discovery rules, an unconstitutional search, and deprivation of a fair trial. Our disposition makes it unnecessary to address those issues.

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and visiting with others until shortly before 1 a.m., August 21. During the course of the evening, in addition to the beer, Berndt also imbibed two shots of tequila, and smoked some marijuana. Witnesses who observed the Berndts that night observed no arguments or altercations between them, and described everyone there as having a good time.

When the couple arrived home, appellant, who had not eaten an evening meal after work, fixed himself something to eat. Thereafter, he smoked a cigarette with Brenda, laid down on the couch, and eventually fell asleep while watching television. Brenda was apparently in the room with him. The three children were sleeping upstairs. Suddenly appellant was awakened, by whom or what he is not sure, but he saw flames by the dining room window. The house was extremely hot and full of smoke. Brenda appeared to be heading through the dining room toward the kitchen area.² Appellant was confused; he panicked, and then ran out the front door. Shortly afterwards, the house burst into flames.

As Berndt came out the door, his next-door neighbor heard him screaming for the fire department. The authorities were immediately called. While waiting for the fire fighters, appellant tried to douse the fire with a garden hose.

Police Officer Adams was the first official on the scene. At the time he arrived, the second story was not burning. Both Adams and appellant searched for a ladder to attempt to save the children on the second floor. The search proved fruitless.

² Immediately after the fire, appellant appeared confused as to what action Brenda had taken. In general, however, in each version, he indicated Brenda was heading into the dining room while he panicked and ran from the house because of the heat and smoke.

When fire fighters eventually arrived,³ appellant was extremely vocal, and voiced his indignation and ire at what he considered an exorbitant lapse of time before fire fighters responded to the alarm. He acted in a hysterical manner, shouting obscenities at the fire fighters and police. His actions so interfered with the fire fighters, they decided to remove him from the scene. Berndt then was transported in a police squad car to his sister's house in Maple Grove by Police Officer Adams.

Adams remained with appellant in Maple Grove until he was ordered by Brooklyn Center Fire Marshal Jerry Pedlar to bring Berndt to the Brooklyn Center Police Department for interrogation. Pedlar had been at the fire scene early. From his observation of the fire's unusual and rapid acceleration, he concluded it might have had an intentional origin. Pedlar ordered Officer Adams to treat Berndt as an arson suspect during the return ride to Brooklyn Center because appellant was the only surviving family member.

At approximately 6 a.m., Adams and appellant arrived at the Brooklyn Center Police Station. Immediately after arrival at the police station, Berndt spent approximately 45 minutes in private with a minister, Chaplain Bodin, who informed him of the deaths of members of his family and counseled him.

Thereafter, Pedlar, a Brooklyn Center Police Department detective, and two deputies from the Hennepin County Sheriff's office jointly questioned appellant. They informed him that they suspected he had intentionally set the fire because of the rapid spread of the fire and because he was the only family survivor. After being given the Miranda warning and

³ The time lapse between the alarm and the response of the fire fighters is in dispute—the evidence ranges from 5 minutes to a half hour.

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after agreeing to talk, Berndt related the events of the previous evening leading up to his discovery of the fire and his escape from the burning house. Following this police interview, a blood sample was taken from appellant at North Memorial Medical Center. Medical testimony at the trial indicated that appellant's blood alcohol level at the time of the fire could have been as high as .12 or .13 percent.

At all times during the early morning hours of August 21, Berndt wore the clothing he had continuously worn since returning home from work the previous evening. At the fire scene, a neighbor woman, seeking to solace Berndt, hugged him. She detected no odor of gasoline on his person. Officer Adams was in close proximity to appellant during the drive in a closed police squad car from Brooklyn Center to Maple Grove and back, but he noted no odor of gasoline on Berndt or his clothing. Chaplain Bodin, who had counseled Berndt for approximately 45 minutes at the police station, detected no odor of gasoline on appellant or his clothing. None of the interrogating officers at the Brooklyn Center Police Department, who were investigating what they considered an incendiary fire, testified to the existence of a gasoline odor on appellant. Trained fire and arson investigators suspecting the use of a fire accelerant to commit arson undoubtedly would be very conscious of the existence of such odors. Hospital technicians who drew Berndt's blood to analyze his blood alcohol level must have been in close proximity with appellant. The state, however, offered no testimony from any hospital personnel on the existence of a gasoline odor on Berndt. Finally, experienced police and fire investigators did not confiscate appellant's clothing.

From August 21 to August 24, 1981, arson investigators collected 26 physical samples from the remains of the Berndt

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townhouse. These included wood cuttings, pieces of carpeting, and vinyl tile. Investigators also videotaped and photographed areas inside the townhouse. Later these samples were analyzed by the use of gas chromatography. The state's analyst concluded that five of the samples indicated the presence of an accelerant—most probably gasoline.⁴

Other witnesses testified that to ignite a fire which would exhibit the burning characteristics of the Berndt fire would require the use of at least 5 gallons of gasoline. The state theorized these 5 gallons had been carefully poured throughout the townhouse, up the stairs and around the children's bedrooms, to insure a fatal conflagration. Had the gasoline been poured throughout the house in the manner hypothesized by the state, it is clear the pouring would have been just before ignition or otherwise its presence would have been obvious to Brenda through her senses of sight and smell. Of course, if she had been unconscious as the result of a fracture or concussion, such observation might have been impossible. However, notwithstanding the severe burning of her body, the

⁴ At the trial, and in post-trial proceedings, the completeness and validity of the tests performed by the state's expert analyst were matters of considerable dispute.

The state's hypothesis, based substantially on the testimony of the test results by its expert, was that the fire had been set by using gasoline as an accelerant. In corroboration of its theory, the state had other evidence that a fire exhibiting the characteristics of the Berndt fire could not have been accidentally ignited through faulty electrical connection, a smoldering cigarette, ignition of carpeting, etc. Appellant, to the contrary, presented testimony that the fire was a "flash back" fire. A flash back fire is created when a fresh supply of oxygen, such as a door opening, reignites a smoldering fire or a build-up of gases, and the resulting fire flashes back across a room. Because the state's case relies so heavily on the premise that a gasoline accelerant was employed, for the purpose of this opinion we examine the record to ascertain if any nexus exists between appellant and any gasoline.

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Hennepin County medical examiner was able to determine that prior to the fire Brenda had not suffered any major type of injury prior to her fire death.⁵

Even if the state's theory is assumed correct, there is no explanation how someone like Berndt, who, after a day's work, has spent an evening drinking and smoking marijuana, and who had an estimated blood alcohol content at the time of the fire of .12 or .13 percent, could have carefully poured gasoline throughout the townhouse in the intricate pattern posited by the state without spilling some of it on his person or clothing. The odor of spilled gasoline on skin or clothing is not easily eliminated. Yet, no witness—lay, police, or fire fighter—smelled any gasoline odor at the fire scene. Nor did any witness that morning smell the odor of gasoline on Berndt outside the burning building, in the squad car, in the police interrogation room or, apparently, at the hospital.

Furthermore, the record is completely devoid of any testimony or other evidence that Berndt had acquired 5 gallons of gasoline. No showing exists that Berndt ever purchased gasoline by container, or that he ever possessed a gas can. No evidence was produced that any person residing in the townhouse project area was missing any gasoline nor any container.

Within a very short time after arriving at the fire scene, authorities suspected appellant had torched the home. Although police and fire officials essentially had exclusive control of the fire remains for at least four days after the fire, they found no containers which could have held the gasoline used as an accelerant, nor did they find siphoning equipment

⁵ Because of burns to her head and face, he could not positively rule out a blow to the face or head, but no fractures were ascertained nor any other evidence of trauma to the head observed.

to link Berndt to this fire. Notwithstanding the absence of such tools, the state, by pure speculation, theorized either that (1) appellant had stolen the gas from the caretaker's supplies, or (2) appellant had siphoned the gas from cars in the parking lot, or (3) the reason no gas can or siphoning equipment was found was that in all probability Berndt had thrown it into a garbage dumpster which had been unloaded the morning after the fire.

All three of those contentions were purely speculative with no factual basis. The caretaker testified that none of his gasoline was missing. There was complete absence of any evidence to substantiate the claim appellant had siphoned gas from parked cars. Though a dumpster had been unloaded the morning of the fire, absolutely no evidence existed that appellant had thrown anything into it. In sum, nothing in the evidence justifies an inference establishing a nexus between appellant and the gasoline—at least 5 gallons of it—used to accelerate the townhouse fire.

In a first-degree murder prosecution, the state has no burden of establishing a motive for the crime. Nonetheless, if the state can establish a credible motive, credibility is lent to the state's contention that the accused committed the crime. The state in this case sought to establish a motive by introducing evidence relating to Berndt's relationship with Brenda, in particular, his propensity to flirt and be promiscuous. Incidents in corroboration of this contention occurred long before the fire date. Moreover, appellant did not deny the incidents, but contended those problems had been resolved well before the fire. No evidence rebuts that assertion. Secondly, the state sought to raise a financial motive by introducing evidence of two insurance policies totaling \$33,900 on Brenda's life. Appellant was not named beneficiary on his

wife's life insurance policy furnished as an automatic benefit – by the State of Minnesota where she was employed. Berndt was surprised to learn that the other policy would pay off the car loan. A reading of the trial record leaves us with the firm impression that the state failed to establish a credible motive for causing Brenda's death.* No motive at all was established for the deaths of the children.

Absent any direct evidence connecting appellant with gasoline or any other kind of accelerant, it is clear that appellant's conviction was based solely on circumstantial evidence. We recognize that normally a jury is in the best position to evaluate the circumstantial evidence surrounding the crime and that the jury's verdict is entitled to due deference. See *State v. Daniels*, 380 N.W.2d 777 (Minn. 1986) and *State v. Anderson*, 379 N.W.2d 70, 75 (Minn. 1985). However, as we have previously stated:

The circumstantial evidence in a criminal case is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt.

State v. Jacobson, 326 N.W.2d 663, 666 (Minn. 1982) (citing *State v. Morgan*, 290 Minn. 558, 561, 188 N.W.2d 917, 919 (1971); *State v. Kaster*, 211 Minn. 119, 121, 300 N.W. 897, 899 (1941)). See also *State v. Ngoc Van Vu*, 339 N.W.2d 892, 898 (Minn. 1983); *State v. Threinen*, 328 N.W.2d 154, 156

* Admission of evidence of the kind and nature used to suggest a motive for the alleged killings is generally discretionary with the trial court. However, in this case arguably there may have been an abuse of discretion. A reading of the record leaves us with a firm impression that the jury's verdict may well have been tainted by such evidence. Jury members may have convicted Berndt because they were offended by his morals.

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(Minn. 1983); *State v. Gibbons*, 305 N.W.2d 331, 336 (Minn. 1981); *State v. Swain*, 269 N.W.2d 707, 712 (Minn. 1978).

Except for the fact that appellant was physically present in his home when the fire started, there exist no other circumstances consistent with the state's hypothesis of guilt. To the contrary, substantially all of the circumstances are consistent with a rational hypothesis other than guilt. It is not rational to infer that, after a day's work and long hours of drinking and partying, with a blood alcohol content sufficient to make him legally under the influence of alcohol, appellant could slosh 5 gallons of gasoline around the townhouse without almost inevitably spilling some of the gas on himself or his clothing. Yet, no witness, most of whom were in close proximity to him that morning, detected a gasoline odor about his person or clothing, even though authorities almost immediately suspected that he was an arsonist.

Nevertheless, the state contends that the Berndt fire was started and accelerated by the use of gasoline. The bodies of three children had high levels of carbon monoxide—a fact that is inconsistent with the state's theory, but is consistent with the defense theory of a flashback fire. Likewise, the autopsy report on Brenda was more consistent with appellant's theory than with that of the state.

Upon discovery of the fire, appellant claims that he, in panic, rushed from the house. The state suggests the contention is irrational because appellant would have been injured had he left in that manner. Yet, there is evidence appellant had singed hair on the left side of his body, and that all the skin on the bottom of his feet turned brown and peeled off a few days after the fire.

The state's theory with respect to the alleged motive for killing Brenda appears to be without rational basis. Though

admitting that in the years before the fire there had been problems between himself and Brenda because of his alleged philandering, the evidence was unrebutted that those disagreements had been ironed out long preceding the fire. The uncontradicted evidence was that appellant loved the boys and enjoyed their company. There exists no consistency, in the light of that undisputed fact, with the state's claim that appellant spread gasoline at the door of the children's bedroom—including that of his own son.

The state's entire case was bottomed on mere speculation or upon hypothesized "facts" not in evidence. Notwithstanding the absence of even a scintilla of evidence from any lay or professional witness of any concussion, blow, or fracture to Brenda's head, the state urged the jury to speculate that Berndt and his wife had fought that evening, resulting in a blow to Brenda's head sufficient to render her unconscious.

The state produced evidence which, if credited by the jury, would sustain its contention that the townhouse fire had been ignited with the use of a gasoline accelerant. About all the state produced to show appellant was the culprit was suspicion unsupported by facts. Some circumstances proved were consistent with the state's claim of an intentional fire, but other circumstances proved were generally consistent with the rational hypothesis that the defendant was not guilty.

The state's burden was to prove the arson-murders beyond a reasonable doubt. Here, the state failed to meet that burden. The circumstantial evidence was not inconsistent with a rational hypothesis other than guilt.

Accordingly, the convictions are reversed.

APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT

Hennepin County

Kelley, J.

C2-84-1661

STATE OF MINNESOTA,

Respondent,

vs.

ORVILLE BERNDT, JR.,

Appellant.

Filed August 29, 1986. Wayne Tschimperle, Clerk of Appellate Courts.

SYLLABUS

State failed to meet its burden to establish the guilt of an accused, convicted of eight counts of first-degree murder, when the convictions rested on circumstantial evidence which was consistent with a rational hypothesis other than guilt.

Reversed.

Heard, considered and decided by the court en banc.

OPINION

Kelley, Justice.

Orville Berndt appeals from his convictions on eight counts of first degree murder arising out of the deaths of his wife, her two sons by a previous marriage, and the son of his wife and himself. All four perished in a fire in August 1981 at the family duplex home in Brooklyn Center. On appeal, Berndt

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claims that the evidence was insufficient to sustain the convictions.¹ We agree. Accordingly, we reverse.

On August 20, 1981, appellant Orville Berndt lived in a townhouse residence in Brooklyn Center with his wife, Brenda; their son, Corey, age 3-1/2; and Brenda's sons, Richard Gage, age 13; and Michael Gage, age 10. Early in the evening after work on August 20, Berndt and his wife went to consult with their automobile insurance agent to obtain insurance coverage on a recently acquired used car. After completing that business, the couple first visited two bars, and later ended up at the Earle Brown Bowl, ostensibly to celebrate the car purchase. They remained there, drinking beer and visiting with others until shortly before 1 a.m., August 21. During the course of the evening, in addition to the beer, Berndt also imbibed two shots of tequila, and smoked some marijuana. Witnesses who observed the Berndts that night observed no arguments or altercations between them, and described everyone there as having a good time.

When the couple arrived home, appellant, who had not eaten an evening meal after work, fixed himself something to eat. Thereafter, he smoked a cigarette with Brenda, laid down on the couch, and eventually fell asleep while watching television. Brenda was apparently in the room with him. The three children were sleeping upstairs. Suddenly appellant was awakened, by whom or what he is not sure, but he saw flames by the dining room window. The house was extremely hot and full of smoke. Brenda appeared to be heading through the

¹ In addition to raising the insufficiency of the evidence issue, appellant has alleged violation of discovery rules, an unconstitutional search, and deprivation of a fair trial. Our disposition makes it unnecessary to address those issues.

dining room toward the kitchen area.² Appellant was confused; he panicked, and then ran out the front door. Shortly afterwards, the house burst into flames.

As Berndt came out the door, his next-door neighbor heard him screaming for the fire department. The authorities were immediately called. While waiting for the fire fighters, appellant tried to douse the fire with a garden hose.

Police Officer Adams was the first official on the scene. At the time he arrived, the second story was not burning. Both Adams and appellant searched for a ladder to attempt to save the children on the second floor. The search proved fruitless.

When fire fighters eventually arrived,³ appellant was extremely vocal, and voiced his indignation and ire at what he considered an exorbitant lapse of time before fire fighters responded to the alarm. He acted in a hysterical manner, shouting obscenities at the fire fighters and police. His actions so interfered with the fire fighters, they decided to remove him from the scene. Berndt then was transported in a police squad car to his sister's house in Maple Grove by Police Officer Adams.

Adams remained with appellant in Maple Grove until he was ordered by Brooklyn Center Fire Marshal Jerry Pedlar to bring Berndt to the Brooklyn Center Police Department for interrogation. Pedlar had been at the fire scene early. From his observation of the fire's unusual and rapid acceleration, he concluded it might have had an intentional origin.

² Immediately after the fire, appellant appeared confused as to what action Brenda had taken. In general, however, in each version, he indicated Brenda was heading into the dining room while he panicked and ran from the house because of the heat and smoke.

³The time lapse between the alarm and the response of the fire fighters is in dispute—the evidence ranges from 5 minutes to a half hour.

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Pedlar ordered Officer Adams to treat Berndt as an arson suspect during the return ride to Brooklyn Center because appellant was the only surviving family member.

At approximately 6 a.m., Adams and appellant arrived at the Brooklyn Center Police Station. Immediately after arrival at the police station, Berndt spent approximately 45 minutes in private with a minister, Chaplain Bodin, who informed him of the deaths of members of his family and counseled him.

Thereafter, Pedlar, a Brooklyn Center Police Department detective, and two deputies from the Hennepin County Sheriff's office jointly questioned appellant. They informed him that they suspected he had intentionally set the fire because of the rapid spread of the fire and because he was the only family survivor. After being given the Miranda warning and after agreeing to talk, Berndt related the events of the previous evening leading up to his discovery of the fire and his escape from the burning house. Following this police interview, a blood sample was taken from appellant at North Memorial Medical Center. Medical testimony at the trial indicated that appellant's blood alcohol level at the time of the fire could have been as high as .12 or .13 percent.

At all times during the early morning hours of August 21, Berndt wore the clothing he had continuously worn since returning home from work the previous evening. At the fire scene, a neighbor woman, seeking to solace Berndt, hugged him. She detected no odor of gasoline on his person. Officer Adams was in close proximity to appellant during the drive in a closed police squad car from Brooklyn Center to Maple Grove and back, but he noted no odor of gasoline on Berndt or his clothing. Chaplain Bodin, who had counseled Berndt for approximately 45 minutes at the police station, detected no odor of gasoline on appellant or his clothing. None of the interrogating officers at the Brooklyn Center Police Depart-

App. B5

ment, who were investigating what they considered an incendiary fire, testified to the existence of a gasoline odor on appellant. Trained fire and arson investigators suspecting the use of a fire accelerant to commit arson undoubtedly would be very conscious of the existence of such odors. Hospital technicians who drew Berndt's blood to analyze his blood alcohol level must have been in close proximity with appellant. The state, however, offered no testimony from any hospital personnel on the existence of a gasoline odor on Berndt. Finally, experienced police and fire investigators did not confiscate appellant's clothing.

From August 21 to August 24, 1981, arson investigators collected 26 physical samples from the remains of the Berndt townhouse. These included wood cuttings, pieces of carpeting, and vinyl tile. Investigators also videotaped and photographed areas inside the townhouse. Later these samples were analyzed by the use of gas chromatography. The state's analyst concluded that five of the samples indicated the presence of an accelerant—most probably gasoline.⁴

⁴ At the trial, and in post-trial proceedings, the completeness and validity of the tests performed by the state's expert analyst were matters of considerable dispute.

The state's hypothesis, based substantially on the testimony of the test results by its expert, was that the fire had been set by using gasoline as an accelerant. In corroboration of its theory, the state had other evidence that a fire exhibiting the characteristics of the Berndt fire could not have been accidentally ignited through faulty electrical connection, a smoldering cigarette, ignition of carpeting, etc. Appellant, to the contrary, presented testimony that the fire was a "flash back" fire. A flash back fire is created when a fresh supply of oxygen, such as a door opening, reignites a smoldering fire or a build-up of gases, and the resulting fire flashes back across a room. Because the state's case relies so heavily on the premise that a gasoline accelerant was employed, for the purpose of this opinion we examine the record to ascertain if any nexus exists between appellant and any gasoline.

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Other witnesses testified that to ignite a fire which would exhibit the burning characteristics of the Berndt fire would require the use of at least 5 gallons of gasoline. The state theorized these 5 gallons had been carefully poured throughout the townhouse, up the stairs and around the children's bedrooms, to insure a fatal conflagration. Had the gasoline been poured throughout the house in the manner hypothesized by the state, it is clear the pouring would have been just before ignition or otherwise its presence would have been obvious to Brenda through her senses of sight and smell. Of course, if she had been unconscious as the result of a fracture or concussion, such observation might have been impossible. However, notwithstanding the severe burning of her body, the Hennepin County medical examiner was able to determine that prior to the fire Brenda had not suffered any major type of injury prior to her fire death.⁵

Even if the state's theory is assumed correct, there is no explanation how someone like Berndt, who, after a day's work, has spent an evening drinking and smoking marijuana, and who had an estimated blood alcohol content at the time of the fire of .12 or .13 percent, could have carefully poured gasoline throughout the townhouse in the intricate pattern posited by the state without spilling some of it on his person or clothing. The odor of spilled gasoline on skin or clothing is not easily eliminated. Yet, no witness—lay, police, or fire fighter—smelled any gasoline odor at the fire scene. Nor did any witness that morning smell the odor of gasoline on Berndt outside the burning building, in the squad car, in the police interrogation room or, apparently, at the hospital.

⁵ Because of burns to her head and face, he could not positively rule out a blow to the face or head, but no fractures were ascertained nor any other evidence of trauma to the head observed.

App. B7

Furthermore, the record is completely devoid of any testimony or other evidence that Berndt had acquired 5 gallons of gasoline. No showing exists that Berndt ever purchased gasoline by container, or that he ever possessed a gas can. No evidence was produced that any person residing in the townhouse project area was missing any gasoline nor any container.

Within a very short time after arriving at the fire scene, authorities suspected appellant had torched the home. Although police and fire officials essentially had exclusive control of the fire remains for at least four days after the fire, they found no containers which could have held the gasoline used as an accelerant, nor did they find siphoning equipment to link Berndt to this fire. Notwithstanding the absence of such tools, the state, by pure speculation, theorized either that (1) appellant had stolen the gas from the caretaker's supplies, or (2) appellant had siphoned the gas from cars in the parking lot, or (3) the reason no gas can or siphoning equipment was found was that in all probability Berndt had thrown it into a garbage dumpster which had been unloaded the morning after the fire.

All three of those contentions were purely speculative with no factual basis. The caretaker testified that none of his gasoline was missing. There was complete absence of any evidence to substantiate the claim appellant had siphoned gas from parked cars. Though a dumpster had been unloaded the morning of the fire, absolutely no evidence existed that appellant had thrown anything into it. In sum, nothing in the evidence justifies an inference establishing a nexus between appellant and the gasoline—at least 5 gallons of it—used to accelerate the townhouse fire.

In a first-degree murder prosecution, the state has no burden of establishing a motive for the crime. Nonetheless, if

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the state can establish a credible motive, credibility is lent to the state's contention that the accused committed the crime. The state in this case sought to establish a motive by introducing evidence relating to Berndt's relationship with Brenda, in particular, his propensity to flirt and be promiscuous. Incidents in corroboration of this contention occurred long before the fire date. Moreover, appellant did not deny the incidents, but contended those problems had been resolved well before the fire. No evidence rebuts that assertion. Secondly, the state sought to raise a financial motive by introducing evidence of two insurance policies totaling \$33,900 on Brenda's life. Appellant claimed he was unaware of his wife's life insurance policy furnished by the State of Minnesota where she was employed. He was not even a named beneficiary on this policy. Berndt was surprised to learn that the other policy would pay off a car loan. A reading of the trial record leaves us with the firm impression that the state failed to establish a credible motive for causing Brenda's death.⁶ No motive at all was established for the deaths of the children.

Absent any direct evidence connecting appellant with gasoline or any other kind of accelerant, it is clear that appellant's conviction was based solely on circumstantial evidence. We recognize that normally a jury is in the best position to evaluate the circumstantial evidence surrounding the crime and that the jury's verdict is entitled to due deference. See *State v. Daniels*, 380 N.W.2d 777 (Minn. 1986) and *State v.*

⁶ Admission of evidence of the kind and nature used to suggest a motive for the alleged killings is generally discretionary with the trial court. However, in this case arguably there may have been an abuse of discretion. A reading of the record leaves us with a firm impression that the jury's verdict may well have been tainted by such evidence. Jury members may have convicted Berndt because they were offended by his morals.

App. B9

Anderson, 379 N.W.2d 70, 75 (Minn. 1985). However, as we have previously stated:

The circumstantial evidence in a criminal case is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt.

State v. Jacobson, 326 N.W.2d 663, 666 (Minn. 1982) (citing *State v. Morgan*, 290 Minn. 558, 561, 188 N.W.2d 917, 919 (1971); *State v. Kaster*, 211 Minn. 119, 121, 300 N.W. 897, 899 (1941)). See also *State v. Ngoc Van Vu*, 339 N.W.2d 892, 898 (Minn. 1983); *State v. Threinen*, 328 N.W.2d 154, 156 (Minn. 1983); *State v. Gibbons*, 305 N.W.2d 331, 336 (Minn. 1981); *State v. Swain*, 269 N.W.2d 707, 712 (Minn. 1978).

Except for the fact that appellant was physically present in his home when the fire started, there exist no other circumstances consistent with the state's hypothesis of guilt. To the contrary, substantially all of the circumstances are consistent with a rational hypothesis other than guilt. It is not rational to infer that, after a day's work and long hours of drinking and partying, with a blood alcohol content sufficient to make him legally under the influence of alcohol, appellant could slosh 5 gallons of gasoline around the townhouse without almost inevitably spilling some of the gas on himself or his clothing. Yet, no witness, most of whom were in close proximity to him that morning, detected a gasoline odor about his person or clothing, even though authorities almost immediately suspected that he was an arsonist.

Nevertheless, the state contends that the Berndt fire was started and accelerated by the use of gasoline. The bodies of three children had high levels of carbon monoxide—a fact that is inconsistent with the state's theory, but is consistent

with the defense theory of a flashback fire. Likewise, the autopsy report on Brenda wa more consistent with appellant's theory than with that of the state.

Upon discovery of the fire, appellant claims that he, in panic, rushed from the house. The state suggests the contention is irrational because appellant would have been injured had he left in that manner. Yet, there is evidence appellant had singed hair on the left side of his body, and that all the skin on the bottom of his feet turned brown and peeled off a few days after the fire.

The state's theory with respect to the alleged motive for killing Brenda appears to be without rational basis. Though admitting that in the years before the fire there had been problems between himself and Brenda because of his alleged philandering, the evidence was unrebutted that those disagreements had been ironed out long preceding the fire. The uncontradicted evidence was that appellant loved the boys and enjoyed their company. There exists no consistency, in the light of that undisputed fact, with the state's claim that appellant spread gasoline at the door of the children's bedroom—including that of his own son.

The state's entire case was bottomed on mere speculation or upon hypothesized "facts" not in evidence. Notwithstanding the absence of even a scintilla of evidence from any lay or professional witness of any concussion, blow, or fracture to Brenda's head, the state urged the jury to speculate that Berndt and his wife had fought that evening, resulting in a blow to Brenda's head sufficient to render her unconscious.

The state produced evidence which, if credited by the jury, would sustain its contention that the townhouse fire had been ignited with the use of a gasoline accelerant. About all the state produced to show appellant was the culprit was sus-

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picion unsupported by facts. Some circumstances proved were consistent with the state's claim of an intentional fire, but other circumstances proved were generally consistent with the rational hypothesis that the defendant was not guilty.

The state's burden was to prove the arson-murders beyond a reasonable doubt. Here, the state failed to meet that burden. The circumstantial evidence was not inconsistent with a rational hypothesis other than guilt.

Accordingly, the convictions are reversed.



APPENDIX C

**State of Minnesota
County of Hennepin**

**District Court
Fourth Judicial District**

D.C. File 80973-01

STATE OF MINNESOTA,

Plaintiff,

vs.

ORVILLE BERNDT, JR.,

Defendant.

ORDER AND MEMORANDUM

The above matter came before the undersigned sitting by special appointment as a District Court Judge for determination of post-trial motion brought on behalf of defendant requesting that the court grant a new trial or order judgment of acquittal pursuant to Minn. R. Crim. P. 26.04(1)(1). Said motion was continued from time to time for the purpose of taking testimony of defense expert Robert Davis and conducting the deposition of state expert Rick Tontarski. All necessary transcripts and memoranda were received by the court by July 24, 1984.

Daniel F. Byrne, Esq. appeared on behalf of the State of Minnesota; Craig Cascarano, Esq. appeared on behalf of the defendant.

Based upon the files, records, depositions, testimony, and written memoranda of both counsel,

IT IS ORDERED:

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1. That defendant's motion for a new trial or for judgment of acquittal is denied in its entirety.
2. That the attached memorandum shall be construed as part of this order.

DATED: August 1, 1984

By the Court

DORIS OHLSEN HUSPENI

Acting District Court Judge by
Special Appointment

MEMORANDUM

On November 12, 1983, Orville Berndt, Jr. was convicted after a jury trial on eight counts of first degree murder involving the death of his wife, their son, and his wife's two children by a prior marriage.

The trial lasted several weeks. The State's theory was that Berndt poured gasoline throughout the house, ignited the gasoline, and then went outside. The State claimed that its theory was supported by Orville Berndt's unusual behavior at the time of the fire, by burn patterns in the house, by the rapidity of the fire, and by expert testimony that traces of gasoline were found in some physical samples taken from the fire scene. Defendant's motion relates to this last evidence.

At trial the State's expert, Rick Tontarski, testified extensively that gasoline was found in 5 of 26 samples taken from the fire scene. He reached this conclusion by analyzing all 26 samples in a gas chromatograph which produces a graphic representation of a sample called a chromatogram. By matching the sample chromatograms to standard gasoline chromatograms, Tontarski concluded that gasoline was present in 5 samples. These results were disputed by the defense expert,

App. C3

Robert Davis. Davis indicated that the 5 so-called positive chromatograms in fact did not contain gasoline.

Both Tontarski and Davis testified extensively at trial. Both were extensively cross-examined. On the last day of trial, Tontarski was recalled for rebuttal testimony. At that time, a State's proposed exhibit (not received) was discovered to be a chromatogram which had not been made available to defendant through discovery. Tontarski had, in fact, made more than one chromatogram for each of the 5 samples in which he had identified gasoline. The additional chromatograms were in his Maryland laboratory. Prior to trial, he had turned over to the defense one chromatogram for each positive sample. Nothing relating to the additional chromatograms was admitted into evidence at trial. Pursuant to a post-trial motion, all positive chromatograms were produced for the defense.

Defendant's motion raises two issues:

1. Whether there was a Rule 9 violation and, if so, would it mandate a new trial.
2. Whether the additional chromatograms are newly discovered evidence that requires a new trial.

1. Reports of examinations and tests are discoverable by the defendant without court order:

The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any results or reports of . . . scientific tests, experiments or comparisons made with the particular case.

Minn. R. Crim. P. 9.01(1)(4). Throughout the discovery stage of this case, the defense requested Tontarski to produce only chromatograms regarding the five positive samples. Discovery of chromatograms taken from the 21 negative samples has never been an issue and is not an issue in this motion. The defense claims that it was unaware that more than one chro-

App. C4

matogram was made for each positive sample. Tontarski insists that he informed the defense at some point during discovery that more than one chromatogram existed for each positive sample. Prior to trial, Tontarski turned over to the defense the one chromatogram for each positive sample that he relied upon for making his identification of gasoline. The other positive chromatograms, while of assistance to Tontarski and while reflecting the presence of gasoline, were merely preparatory to insure the right sample volume, select the right amplification setting, or determine the need for clean-up procedures.

Discovery requests between the defense and prosecution were not in writing. Therefore it is difficult to determine whether the discovery request necessarily encompassed all chromatograms showing evidence of gasoline, or only those 5 chromatograms that Tontarski relied on for his opinion. In any event, there was no bad faith on Tontarski's part in not turning over all the chromatograms.

Rule 9 itself is not helpful in determining the extent of Tontarski's obligation to produce, but the principles underlying that rule lend guidance. Discovery is intended to give:

both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial.

State v. Schwantes, 314 N.W.2d 243, 245 (1982). In *Schwantes*, the court reversed a conviction because the prosecutor failed to disclose evidence it had before trial that was used to impeach the defendant's alibi.

This case is very different. Before trial, the defense was equipped with Tontarski's conclusions and with the underlying information on which he relied. The preliminary chromatograms shed no appreciably brighter light on either his

App. C5

technique or on his ultimate opinions. Unlike *Schwantes*, any potential surprise here was minimized by keeping the additional chromatograms out of evidence. The prosecutor did not use the information to his advantage. In fact, it was the prosecutor who was responsible for calling the entire matter to the court's attention. Trial preparation was not seriously impeded. The defense was not prejudiced.

Even if Rule 9 were violated, it would not necessitate a new trial, especially since the failure to disclose was in good faith and was nonprejudicial. See, *State v. Daniels*, 332 N.W.2d 172 (Minn. 1983). To avoid these issues in the future, no doubt the better procedure would be to put requests in writing.

2. To justify a new trial, newly discovered evidence must be of a sort that could not have been discovered before trial by due diligence and that would materially have affected the outcome of the trial. *State v. Meldahl*, 310 Minn. 136, 245 N.W.2d 252 (1976); Minn. R. Crim. P. 26.04(1). The defense arguments do not meet this standard.

At the post-trial hearing, Davis testified that the additional chromatograms showed that Tontarski's technique was unreliable, that Tontarski was operating without standards, that ordinary building compounds were incorrectly considered, and that he believed Tontarski's samples were contaminated. Davis also expressed the concern that the additional chromatograms did not closely resemble the chromatograms that were supplied in pre-trial discovery.

Virtually all of these matters were exhaustively dealt with at trial. The question of standards, specifically a carbon disulphide standard, was explicitly raised at trial. Moreover, at his deposition Tontarski showed that his file on the case in fact contained that standard. Davis' concerns about contamination arose chiefly from the fact that sample containers

were punctured to "purge and trap" the contents. He argued that puncturing may have introduced foreign elements into the samples. These punctures were quite noticeable in the containers during trial, so the contamination argument was available to Davis at that time. In any event, Tontarski testified at his deposition regarding the safeguards taken to protect the integrity of the samples. The fact that Tontarski ran no control samples of building compounds in the house, such as carpeting, also was an issue before the jury. The one concern most directly related to the belated discovery of additional chromatograms was that they did not match the chromatograms which were turned over to the defense before trial. At his deposition, Tontarski explained that this was to be expected since in many instances his equipment was adjusted or the sample was cleaned of impurities to permit more accurate identification. These adjustments and cleansings would change the shape of the graph in each chromatogram.

The post-trial discovery of additional chromatograms provided no significant opportunities for cross-examination of Tontarski that did not exist at trial. Their disclosure before trial would not have made a material difference to the outcome. For these reasons, the defendant's motions are denied.

D.O.H.

APPENDIX D

C2-84-1661

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,

Petitioner-Respondent,

vs.

ORVILLE BERNDT, JR.,

Respondent-Appellant.

MOTION FOR ORDER DIRECTING DISTRICT COURT
TO DELIVER TRIAL COURT EXHIBITS TO
MINNESOTA SUPREME COURT

To the Supreme Court, State of Minnesota :

This court filed a decision on March 21, 1986, reversing Appellant's four convictions for Murder in the First Degree. Since the filing of this decision, Respondent has learned that certain trial exhibits which were used at trial to explain the testimony of the arson experts were never delivered by the Hennepin County District Court to this court. *See Affidavit of Susan Lynn-Paul Hauge, law clerk; Beverly J. Wolfe, attorney.* Among the exhibits that were not delivered are the following: State's Exhibit Nos. 1, 2, 3, 4, 5, 18, 19, 20, 21, 22, 23, 24, 25, 31, 45, 46, 47, 48 and Defendant's Exhibit M. *See Index attached to affidavits.*

The State respectfully submits that the complicated arson testimony cannot be adequately understood without reference to the undelivered exhibits. The State is filing a Petition for Rehearing in this case along with this motion. It is submitted that it is essential that this court examine these undelivered

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exhibits when it considers this Petition. Therefore, Respondent respectfully requests that this court order the district court to deliver all trial court exhibits in this case to this court.

DATED: April 10, 1986

Respectfully submitted,
BEVERLY J. WOLFE
Assistant County Attorney
Atty. Lic. No. 131751
C-2000 Government Center
Minneapolis, MN 55487
Phone: 348-8794
Attorney for Petitioner-
Respondent

C2-84-1661
STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,
Respondent,
vs.
ORVILLE BERNDT, JR.,
Appellant.

AFFIDAVIT

State of Minnesota
County of Hennepin—ss.

Susan Lynn-Paul Hauge, being first duly sworn on oath, deposes and says:

1. That she is a law clerk for the State of Minnesota, the Respondent in the above-entitled matter.

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2. That she notified Kim Kuehn (297-1904), who works in the Minnesota Supreme Court Clerk's Office, on April 1, 1986, that it was necessary for her to borrow State's Exhibits Nos. 18 and 19 in the above-entitled manner for the purpose of reproducing and reducing them to be used in Respondent's Petition for Rehearing.

3. That on April 1, 1986, she went to the Clerk's Office to pick up those exhibits.

4. That she learned at that time from Kim Kuehn that State's Exhibits Nos. 18-25 were not listed on the District Court's Index of trial court record and had never been delivered to the Supreme Court.

5. That she received from Kim Kuehn a copy of the Index of the District Court File (see attachment) which showed that a large number of trial court exhibits were never delivered to the Supreme Court.

6. That Kim Kuehn called the Hennepin County District Court File Room for her and told her that these exhibits are locked up on B level under the supervision of Jerry Wallner and that a court order would be necessary to obtain them.

Further your affiant sayeth not.

Dated: April 8, 1986.

SUSAN LYNN-PAUL HAUGE

Law Clerk

C-2000 Government Center

Minneapolis, MN 55487

Phone: 348-3607

Law Clerk for Respondent

Subscribed and sworn to before me this 8th day of April, 1986. Barbara A. Besta, Notary Public.

Barbara A. Besta, Notary Public--Minnesota, Ramsey County, my commission expires Sept. 21, 1990.

C2-84-1661

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

vs.

ORVILLE BERNDT, JR.,

Appellant.

AFFIDAVIT

State of Minnesota

County of Hennepin—ss.

Beverly J. Wolfe, being first duly sworn on oath, deposes and says:

1. That she is an attorney for the State of Minnesota, the Respondent in the above-entitled matter.
2. That she learned on April 1, 1986, from her law clerk Susan Lynn-Paul Hauge, that numerous trial court exhibits in the above-entitled case were never delivered by Hennepin County District Court to the Minnesota Supreme Court.
3. That in June, 1985, she was absent from work due to illness and that she spoke by phone with a woman (name unknown) in the Hennepin County District Court Clerk's Office about her borrowing State's Exhibits No. 35-37 (video tapes) from the district court file. During this conversation, she told the woman that because this was a complicated arson case it was important that all of the trial court exhibits be delivered to the supreme court. She was told by the woman that the district court clerk's office was in the process of pre-

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paring the exhibits and file for delivery to the supreme court.

4. That to the best of her knowledge, no copy of the trial court record index was ever sent to her office.

5. That she was under the good faith belief that all the trial court exhibits had been delivered to the supreme court.

6. That she has examined both the exhibits that were not delivered and the trial transcript and it is her belief that reference to the exhibits, especially State's Exhibits Nos. 18 and 19, are necessary to understand the opinions by the State's arson experts that Appellant could not have been inside the townhouse at the time the fire was ignited.

7. That she believes that transmission of these exhibits to the supreme court is essential in order for this court to understand the points that will be raised in the Petition for Rehearing that Respondent will be filing on or before April 10, 1986.

8. That her office has learned from Jerry Wallner of the Hennepin County District Court Clerk's Office that an order by the supreme court is necessary before the district court can deliver exhibits to the supreme court.

Further your affiant sayeth not.

Dated: April 8, 1986.

BEVERLY J. WOLFE

Assistant County Attorney

Atty. Lic. No. 131751

C-2000 Government Center

Minneapolis, MN 55487

Attorney for Respondent

Subscribed and sworn to before me this 8th day of April, 1986, Barbara A. Besta, Notary Public.

Barbara A. Besta, Notary Public—Minnesota, Ramsey County. My commission expires Sept. 21, 1990.

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

May 14, 1985

APPELLATE/SUPREME COURT RECEIPT

? ? ? ? ?

vs.

ORVILLE BERNDT, JR.

No. D.C. No. 80973-1

C2-84-1661

St. Paul, Minnesota

Received of Jack M. Provo District Court Administrator,
Fourth Judicial District, Hennepin County, Minnesota, the
original file consisting of:

	Date Filed
1. Indictment (Copy)	08-17-82
2. Indictment (Original)	08-17-82
3. Notice of Prosecuting Attorney of Evidence and Identification Procedure Pursuant to Rule 7.01	08-18-82
4. Affidavit	09-02-82
5. Follow-up Report	
6. Allied Fidelity Bond	09-02-82
7. Letter Filed	09-08-82
8. Notice of Motion and Motion	11-10-82
9. Notice of Motion and Motion	11-15-82
10. Order	03-04-83
11. Judgment	11-12-83

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12. List of Possible State's Witnesses	11-14-83
13. Memorandum in Support of Defendant's Motion in Limine No. 1	11-14-83
14. Defendant's Motion in Limine No. 1	11-14-83
15. Defendant's Motion in Limine No. 4	11-14-83
16. Memorandum in Support of Defendant's Motion in Limine No. 3	11-14-83
17. Defendant's Motion in Limine No. 3	11-14-83
18. Defendant's Motion in Limine No. 5	11-14-83
19. State's Memorandum	11-14-83
20. Letter	11-14-83
21. Memorandum in Support of Defendant's Motion in Limine No. 5	11-14-83
22. Defendant's Motion in Limine No. 2	11-14-83
23. Guilty Verdict Sheet	11-10-83
24. Guilty Verdict Sheet	11-16-83
25. Guilty Verdict Sheet	11-16-83
26. Guilty Verdict Sheet	11-16-83
27. Guilty Verdict Sheet	11-16-83
28. Guilty Verdict Sheet	11-16-83
29. Guilty Verdict Sheet	11-16-83
30. Guilty Verdict Sheet	11-16-83
31. Defendant's Proposed Witness List	11-14-83
32. Criminal Witness List	11-16-83
33. Jury List	11-16-83
34. Jury List	11-16-83
35. Criminal Witness List	11-16-83
36. Sentence Transcript	11-17-83
37. Sentence Transcript	11-18-83
38. Notice of Motion and Motion	11-25-83
39. Order	12-09-83

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40.	Order	01-05-84
41.	Order	02-01-84
42.	Order	03-05-84
43.	Letter	08-01-84
44.	Letter	08-01-84
45.	Letter	08-01-84
46.	Order	08-01-84
47.	Memorandum in Support of Motion for New Trial	08-01-84
48.	Memorandum Opposing Motion for New Trial	08-01-84
49.	Letter	08-01-84
50.	Letter	08-01-84
51.	Letter	08-01-84
52.	Letter	08-01-84
53.	Order And Memorandum	08-01-84
54.	Order for Writ of Habeas Corpus Ad Prosequendum/Writ of Habeas Corpus Ad Prosequendum	03-19-84
55.	Writ Of Habeas Corpus Ad Prosequendum	03-19-84
56.	Letter	08-03-84
57.	Letter	08-03-84
58.	Letter	08-03-84
59.	Letter	08-03-84
60.	Letter	08-03-84
61.	Letter	08-03-84
62.	Letter	08-03-84
63.	Letter	08-03-84
64.	Letter	08-03-84
65.	Letter	08-03-84
66.	Letter	08-03-84
67.	Letter	08-03-84

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68. Letter	08-03-84
69. Letter	08-03-84
70. Letter	08-03-84
71. Letter	08-03-84
72. Letter	08-03-84
73. Letter	08-03-84
74. Letter	08-03-84
75. Letter	08-03-84
76. Letter	08-01-84
77. Letter	08-20-84
78. Certificate as to Transcript	09-24-84
79. Notice of Appeal to Supreme Court	09-14-84
80. Letter	09-14-84
81. Notice of Case Filing	
82. Certificate as to Transcript Delivery	11-19-84
83. Certificate as to Transcript Delivery	11-19-84
84. Letter	12-10-84
85. Filing of Appellant's Brief	05-13-85

EXHIBIT'S

State Exhibits:	Item
86. No. 6A - 6B	Photo's
87. No. 7A - 7B	Photo's
88. No. 8A - 8C	Photo's
89. No. 9A - 9I	Photo's
90. No. 10A - 10F	Photo's
91. No. 11A - 11K	Photo's
92. No. 12	Photo
93. No. 13	Photo
94. No. 17A - 17D	Photo's
95. No. 26	Photo
96. No. 27 - 30	Photo
97. No. 32 - 33	Life Insurance Check

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98.	No. 34	Life Insurance Policy
99.	No. 38 - 39	Photo
100.	No. 40 - 41	Diagram
101.	No. 42 - 44	Photo
102.	No. 35 - 37	Videotape's
	Defendant's Exhibits:	Item
103.	A	Graph's
104.	B - F	Recording Charts
105.	J - L	Photo's
106.	N4 - N53	Graphs
107.	O	Graph's
108.	P	Graph's

TRANSCRIPT'S

109.	Omnibus Hearing	11-19-84
110.	Motion	11-19-84
111.	Volume III - XVI	11-19-84
112.	Post Trial Hearing	04-26-85

in the above entitled cause.

APPENDIX E

C2-84-1661

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,
Petitioner-Respondent,
vs.
ORVILLE BERNDT, JR.,
Respondent-Appellant.

MOTION TO ACCEPT PHOTO REPRODUCTIONS OF
STATE'S EXHIBITS NOS. 18 AND 19

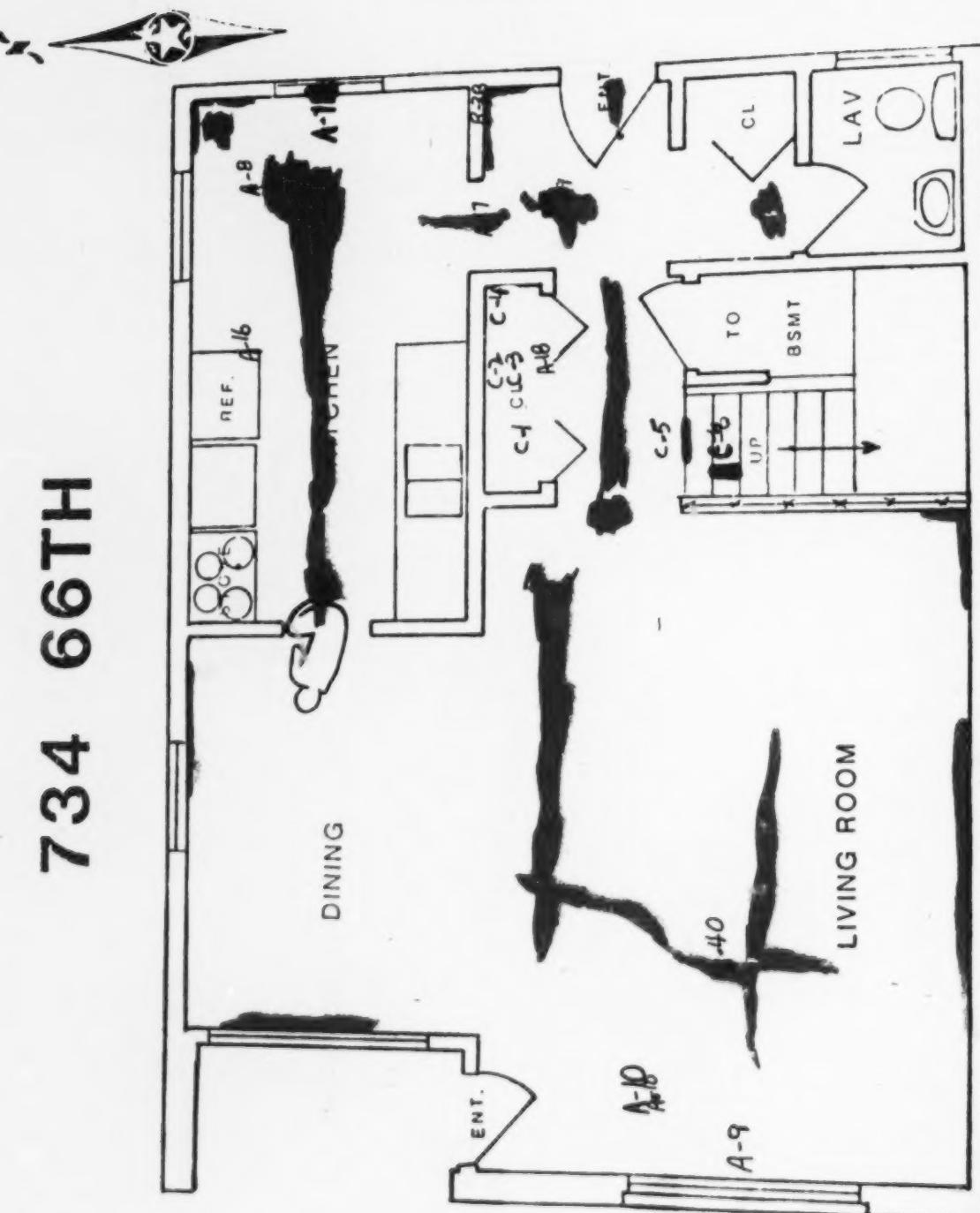
TO THE SUPREME COURT, STATE OF MINNESOTA:

The State of Minnesota respectfully requests that this court accept the State's photo reproductions of State's Exhibits Nos. 18 and 19 and to have them distributed with the Petition for Rehearing. It is submitted that reference to these photo reproductions are necessary to understand the State's Petition for Rehearing.

Dated: April 10, 1986.

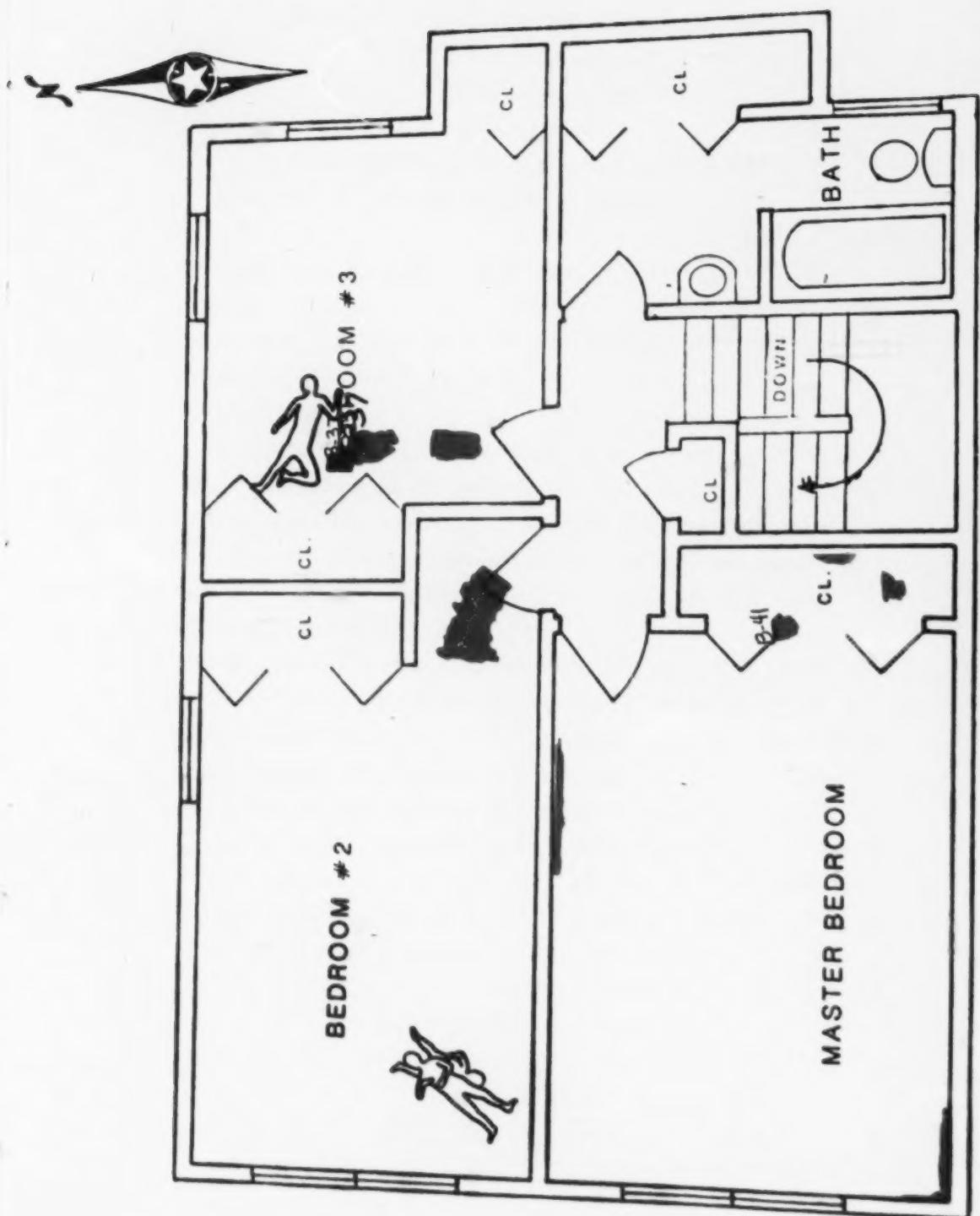
Respectfully submitted,
MICHAEL RICHARDSON
For BEVERLY J. WOLFE
Assistant County Attorney
Atty. Lic. No. 91388
C-2000 Government Center
Minneapolis, MN 55487
Phone: 348-5988
Attorney for Petitioner-
Respondent

APPENDIX F



734 66TH

APPENDIX G





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APPENDIX H

INTERNATIONAL ASSOCIATION OF ARSON
INVESTIGATORS, INC.

25 Newton Street
P.O. Box 600
Marlboro, Massachusetts 01752
Telephone (617) 481-5977

April 8, 1986

Bruce Ryden, Fire Marshal
City of Roseville
2660 Civic Center Drive
Roseville, Minnesota 55113

Dear Mr. Ryden:

On August 16, 1985 you filed a formal grievance against Shelby Gallien with the Ethical Practices and Grievance Committee of the International Association of Arson Investigators, Inc. This complaint concerned itself with trial testimony given by Mr. Gallien in a multiple homicide-arson case that was tried in Minneapolis.

The Committee has made numerous attempts to locate Mr. Gallien. These attempts included efforts made by representatives of the Committee to contact him personally, as well as efforts made by telephone and by mail. All of these attempts have been unsuccessful to date. The Committee is in receipt of an unverified report that Mr. Gallien was seriously ill.

The grievance is still pending before this Committee and efforts to locate Mr. Gallien will continue in order to bring this matter to a conclusion.

Very truly yours,
JOHN R. LEWIS
Chairman
Ethical Practices and
Grievance Committee

COMPLAINT

We, the undersigned, being members in good standing of the International Association of Arson Investigators, do hereby respectfully request the Officers & Board of Directors of the Association consider sanctions as specified in Article II, Section 7.b. of the Constitution & Bylaws against Mr. Shelby Gallien, 1324 Northwestern Avenue, West Lafayette, Indiana 47906 for violation of the Code of Ethics of the Association.

The following section of said Code of Ethics are alleged to have been violated:

1. "I will regard it my duty to know my work thoroughly. It is my further duty to avail myself of every opportunity to learn more about my profession."
2. I will make no claims to professional qualification which I do not possess.
3. I will bear in mind always that I am a truth seeker, not a case maker. That it is more important to protect the innocent than to convict the guilty.

Respectfully submitted,

Bruce E. Ryden

William H. Bruen

COMPLAINANTS INVOLVEMENT IN TRIAL

The complainants were requested by the fire chief of the municipality where the fire occurred and the prosecutor to monitor the trial during the defense expert witness testimony to offer rebuttal to this expert both to the prosecutor and to testify if necessary.

Both complainants sat through the 1-1/2 days of direct testimony and the 1-1/2 days of cross examination, redirect and recross examination. It is the information obtained during this period upon which the complaint is based.

BACKGROUND

In August 1981, a fire in a townhouse took the lives of a mother and her three children. The father, allegedly asleep on the couch in the living room, awoke to see his wife on the floor of the dining room and a fire at the ceiling over his wife. He ran from the house (barefooted) and suffered no injuries. The wife died instantly of burns of the respiratory tract and the children of smoke inhalation after they got out of bed.

An investigation determined that gasoline like residue was found in samples of hardwood flooring, vinyl tile flooring and from the only piece of carpet left in the living room. AFT Labs in Washington, D.C. did the analysis.

Classic flammable burn patterns were found at the entrance to each of the children's bedrooms, at the bottom of the stairway to the second floor, the kitchen floor, living room, around the wife's body in the dining room and in the entryway to the townhouse.

A grand jury was impaneled and returned indictments on four counts of murder in the first degree and four counts of arson in the first degree against the father.

The trial was held in Minneapolis during which Shelby Gallien of 1324 Northwestern Avenue, West Lafayette, Indiana, testified for the defense. Mr. Gallien testified under direct examination that he believed there were three possible causes of the fire and the local investigators did an inadequate job of investigating due to inexperience. His three possible points of origin were:

1. Electrical fire in the exterior wall of the kitchen.
2. Frying pan left on kitchen range.
3. Cigarette dropped on carpet by wife next to her body.

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When asked if the fire could have been due to gasoline being poured throughout the building and ignited from the outside, he stated: "Absolutely not".

Under cross examination, Mr. Gallien withdrew his opinions as to the electrical origin after being reminded that all receptacles and switches were removed, examined and found to have not been involved in the origin of the fire. He also withdrew the frying pan theory when reminded that the defendant and the investigators had testified the burners were all in the off position.

He continued to stick to his theory that a cigarette dropped on the carpet would melt the carpet back to its petroleum base, cause the smoke and hot gases to buildup at the ceiling and "flashback" in a localized area within 1-1/2 hours.

Under redirect examination, Mr. Gallien attempted to refute his testimony under cross examination by saying the prosecutor put words in his mouth but he (Mr. Gallien) had in no way attempted to eliminate the possibilities of the electrical or grease fire origins. He was still convinced that those three points could not be eliminated due to the inadequate investigation by the local investigators.

Under recross examination, Mr. Gallien's testimony under cross examination was read back and he stated, without any prompting by the prosecutor, "I've eliminated the electrical as a possible point of origin" and later, "I've eliminated the frying pan as a possible point of origin." The prosecutor stated: "Now lets get this straight, you originally had three possible points of origin, first the electrical in the kitchen and you've now eliminated that," "Yes sir". "Second, the frying pan on the stove and you've now eliminated that", "Yes sir". At that point both the prosecutor and defense attorney dismissed the witness.

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The fire was investigated by members of the local fire department, the county sheriff department and, on consultation, the then head of the Minneapolis Arson Squad.

The jury found the defendant guilty of four counts of murder in the first degree, four counts of arson in the first degree and he was sentenced to life in prison.

SHELBY GALLIEN DIRECT TESTIMONY

1. Claims to have started IAAI and trained, personally, 3,000 to 4,000 arson investigators.
2. Invented the use of the gas chromatograph in fire investigation.
3. Stated that if you do not have melted glass and melted alum. you do not have an accelerated fire.
4. Gasoline accelerated fire will reach "2,000° - 2,100° - 2,200°F".
5. Stated copper will melt if it is in an accelerated fire.
6. Could not light an accelerated (gasoline) fire and get away without being badly burned.
7. Stated 1 gallon of gasoline equals 400 lbs. nitroglycerine or 45 lbs. dynamite. Later changed to 85 lbs. nitro = 54 lbs. dynamite in "footpower".
8. Gave flammable limits for gasoline as 1.75 - 4% in air.
9. Stated carpet would melt down, pool and leave a gasoline like residue.
10. Heavy soot on windows indicates it could not have been a gasoline accelerated fire because gasoline burns hotter and cleaner.
11. Stated gasoline accelerated fire would have burned through floor—no burn through—no accelerant.
12. Explained burn patterns on hardwood floors being due to hot roof tar dropping on floor. (Totally disregarded)

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- fact that there was gypsum wallboard and fiberglass insulation between roof and flooring).
13. Also gave "floor oil" and heavy wax on floor as explanation for burn patterns.
 14. Stated size of alligatoring is not an indicator of the speed of a fire.
 15. Sample of floor tile in entryway came in positive for accelerant. Gallien stated could not have been gasoline or it would have burned and been consumed.
 16. Was unable to differentiate between BX cable and thin-wall conduit but stated that if a short had taken place, a temperature of 4,000, 5,000 or 6,000° would have melted the "iron" box and splattered molten metal all over. Arc will continue until box is completely gone.
 17. Dry wall corner beading was not melted because there was no accelerant. If there had been an accelerant, it would have melted the aluminum beading. Beading was actually steel.
 18. Courtroom was *too large* to have a flashover fire.
 19. Testified the fire was slow starting fire with approximately 1-1/2 hour delay. Smoke and hot gases built-up to 3' - 3-1/2' deep at ceiling and "flashbacked".
 20. "Flashback" type of fire has 4 phases:
 - Phase 1. Smudge—such as from a cigarette—approximately 1-1/2 hours long.
 - Phase 2. Heat level at ceiling—3' - 5' deep—flashback.
 - Phase 3. Natural burn.
 - Phase 4. Natural phase.
 21. Testified "flashback" type of fire will flash down walls and cause a localized burning in center of floor. Most intense heat will be in center of the floor.

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22. Low burning is characteristic of a "flashback" fire.
23. V patterns will show up in a "flashback" fire.

CROSS EXAMINATION

Mr. Gallien testified that:

1. "Graduate of OSHA Institute's course on Industrial Fire Investigation", there is no such course at OSHA.
2. NFPA determines flame spread rates.
3. Was not familiar with current standard tests on carpeting.
4. Burn patterns on floors were due to either air currents from windows or possibly from fire department fog patterns.
5. Ordinary steel melts at 2,200°F. - 2,300°F. or 2,400°F. Chrome steel melts at 2,600°F. - 2,700°F.
6. A drop of gasoline will fall faster than a drop of tar.
7. Light bulbs are not indicators that point to the origin area of a fire.
8. Cigarettes burn for 22 minutes and will start a fire in 1-1/2 hours if uninsulated.
9. *Carbon Dioxide* is flammable in and of itself.
10. Fires burn without oxygen.
11. Gasoline ignition temperature is + 45°F.
12. "Flashback" fires can be limited to a very small area of ceiling of a room.
13. Natural air drafts cause ruts to be burned in the floor.

REDIRECT

1. Difference between 4% and 7.6% upper flammable limit:
 - 7.6% will be low order explosion—slower.
 - 4% will be high order explosion—faster.

APPENDIX I

C2-84-1661

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,
Petitioner-Respondent,
vs.
ORVILLE BERNDT, JR.,
Respondent-Appellant.

PETITION FOR REHEARING

WILLIAM R. KENNEDY	HUBERT H. HUMPHREY
Hennepin County	Minnesota Attorney General
Public Defender	102 State Capitol
DAVID KNUTSON	St. Paul, MN 55155
Assistant County	THOMAS L. JOHNSON
Public Defender	Hennepin County Attorney
C-2300 Government Center	VERNON E. BERGSTROM
Minneapolis, MN 55487	Chief, Appellate Section
Attorneys for Respondent-	By: BEVERLY J. WOLFE
Appellant	Assistant County Attorney
	Atty. Lic. No. 131751
	Phone: 348-8794
	C-2000 Government Center
	Minneapolis, MN 55487
	Attorneys for Petitioner-
	Respondent

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II. Summary of Petition	App. I4
III. In Holding That The Evidence Was Insufficient, This Court Overlooked And Misconceived Mate- rial Evidence In The Case.	App. I5
IV. Examination Of The Material Evidence That Was Overlooked And Misconceived By This Court Makes Clear That The Evidence Viewed In The Light Most Favorable To The Verdict Was Suf- ficient To Sustain The Jury's Verdicts.	App. I20
V. Because The Evidence Was Technically Sufficient To Sustain The Jury's Verdicts, The Interests Of Justice Require Either That The Verdicts Be Reinstated Or That The Case Be Remanded For Trial.	App. I40
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I. STATEMENT OF THE CASE

On August 17, 1982, the Hennepin County Grand Jury returned an indictment charging Orville Berndt, Jr., the Respondent-Appellant in this case (hereinafter referred to as Appellant) with four counts of Murder in the First Degree in violation of Minn. Stat. §609.185(1) (intentional and pre-meditated murder) and with four counts of Murder in the First Degree in violation of Minn. Stat. §609.185(3) (1981) (intentional murder by arson) for the deaths of his wife Brenda Berndt, his son Corey Berndt and his wife's two sons Michael Gage and Richard Gage. Following Appellant's pleas of not guilty to all counts, jury trial commenced before The Honorable Doris Ohlsen Huspeni on October 20, 1983 (T.1). On November 12, 1983, the jury returned verdicts finding Appellant guilty of all eight first degree murder counts (T. 2333). Immediately following these verdicts, the trial court sentenced Appellant to mandatory terms of life imprisonment for each first degree conviction pursuant to Minn. Stat. §609.-185(3) and ordered that the sentences be served concurrently (T.2340-42). Appellant's remaining four first degree murder convictions were merged pursuant to Minn. Stat. §609.035 (1981) (T.2342). Appellant filed a Motion for New Trial or Judgment of Acquittal which was denied by the trial court on August 1, 1984.

Appellant filed his Brief with this court on May 1, 1986. The State of Minnesota, the Petitioner-Respondent in this case, filed its Brief on July 12, 1986. Oral argument was held before this court on November 7, 1985. On March 21, 1986, this court filed a decision reversing Appellant's eight convictions of Murder in the First Degree. See *State v. Berndt*, — N.W.2d — (Minn., filed March 21, 1986). From this decision reversing Appellant's murder convictions, the State of

Minnesota petitions this court for rehearing pursuant to Minn. R.Civ.App.P. 140.01.

II. SUMMARY OF PETITION

In reversing the jury's findings that Appellant was guilty of eight counts of Murder in the First Degree for the deaths of his family, this court held that the evidence was insufficient to sustain the verdicts. The State respectfully submits that this court both overlooked critical portions of the evidence put forth by the State's arson experts and misconceived material evidence in the record. The State also submits that when the evidence that has been overlooked and misconceived is examined in the light most favorable to the jury's verdicts, the evidence presented by the State at trial is sufficient to sustain the jury's verdict.

Finally, it is submitted that the decision demonstrates that this court reconsidered the weight of the evidence—crediting testimony rejected by the jury and rejecting testimony credited by the jury. In doing so this court has departed from its usual standard of review and has, in effect, acted as a "thirteenth juror." Accordingly, pursuant to the United States Supreme Court holding in *Tibbs v. Florida*, 457 U.S. 31 (1982), it is respectfully submitted that the interests of justice require a new trial. Moreover, a new trial would not merely be a retrying of the same evidence since new evidence supporting Appellant's guilt has come to light. This new evidence includes: (1) Appellant's confession of the murders to a fellow inmate in April, 1985, and (2) the initiation of disciplinary actions by the International Association of Arson Investigators against the defense expert Shelby Gallien based upon his testimony at Appellant's trial.

III. IN HOLDING THAT THE EVIDENCE WAS INSUFFICIENT, THIS COURT OVERLOOKED AND MISCONCEIVED MATERIAL EVIDENCE IN THE CASE.

The decision in this case demonstrates that this court has overlooked and misconceived material evidence in this case. The overlooked and misconceived evidence can be classified into the following categories.¹

A. The Decision Overlooked Material Exhibits and Material Arson Expert Testimony.

(1) After this court filed its decision, the State learned for the first time that material exhibits that were received into evidence were never delivered by the district court to this court.² See Affidavits, reprinted at pp. 13-16 of Petitioner's Appendix. Specifically, State's Exhibits Nos. 18 and 19 were not delivered to the court.³ These exhibits show: the layout of both the first floor (Exhibit No. 18) and the second floor

¹ It is respectfully submitted that the decision contains numerous statements that either overlook conflicting evidence or are based upon misconceptions of the evidence. For the purposes of this Petition, the State will note only those statements that were material to this court's holding that the evidence of guilt was insufficient.

² The State is filing along with this Petition a separate motion requesting an order directing the district court to deliver the exhibits to this court. See Petitioner's Appendix, pp. 11-12.

³ Due to the significance that State's Exhibits Nos. 18 and 19 have in the jury's understanding of the testimony by the arson experts, the State has had these two exhibits reproduced and is sending fourteen copies of these exhibits to this court with this Petition.

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(Exhibit No. 19) of the townhouse (T.403);⁴ the location of the victims' bodies (T.410); the location of the suspicious burn patterns (T.403, 407, 410); and the location from where the positive gasoline samples were taken (T.414). At page 18, n. 12 of its Brief, the State specifically referred this court to Exhibits Nos. 18 and 19 in explaining the testimony of its arson experts. The unavailability of these exhibits has resulted in this court overlooking crucial evidence pertaining to the sufficiency issue. The jurors' acceptance of the State's arson experts' opinion that Appellant could not have escaped from the house without incurring severe bodily harm was based upon their examination and understanding of these two exhibits. It is respectfully submitted that this court could not have concluded that Appellant's story of escape was rational or feasible had it examined these exhibits. See *Berndt*, slip op. at 2-3.

Other significant exhibits not delivered to the court include State's Exhibits Nos. 1, 3, 4 and 5. State Exhibit No. 1 shows where the fire department is located in relationship to Appellant's townhouse and where Officer Adams and the neighbors were when they heard an explosion-type noise at 2:45 a.m. (T.53, 316). This exhibit buttresses the testimony by the State's witnesses that the fire was a rapidly-spreading fire

⁴ "T" refers to the transcript of the trial that commenced before The Honorable Doris Ohlsen Huspeni on October 20, 1983. The trial transcript consists of Volumes I-XVI.

This case also involved numerous pretrial and post trial hearings. Hereinafter, this Petition will refer to the transcripts of these various hearings as follows:

"O" refers to the omnibus hearing held before The Honorable Doris Ohlsen Huspeni on October 3, 4 and 5, 1983.

"M" refers to the post trial evidentiary hearing held before The Honorable Doris Ohlsen Huspeni on March 21, 1984.

"D" refers to the deposition taken from Richard Tontarski on May 8, 1984.

and that the fire department arrived on the scene within minutes of the fire being reported. State's Exhibits Nos. 3, 4, and 5 show where Appellant's neighbors' bedroom window was located and how their observance of the fire outside that window was inconsistent with Appellant's claim as to where the fire was located when it first started (T.241-43, 253-54). Examination of these exhibits was critical to the jurors' evaluation of the witnesses' testimony at trial and is necessary to any appellate review of the jury's findings.

(2) The court's acceptance of Appellant's testimony that there was an isolated fire in the townhouse prior to his escape from the house overlooks and misconceives the State's arson experts' testimony. *See Berndt*, slip op. at 2-3. The State's experts testified that the presence and location of gasoline in the house caused an automatic ignition throughout the first floor which made the existence of a small isolated fire impossible for any period of time. The evidence accepted by the jury at trial showed that gasoline was spread through the kitchen, the living room in front of the sofa, the hallway located between the living room and front door, on the stairs and near the front entryway. *See* State's Exhibit No. 18 (positive gasoline findings denoted in black ink). The evidence also showed that the heaviest area of burning was in the living room and in the area where living room and dining room meet. *See* State Exhibit No. 18 (suspicious burn patterns denoted in red ink). On the basis of this evidence, the State's arson experts ruled out the possibility of a small isolated fire for any period of time and testified that ignition of the fire would cause automatic ignition throughout the first floor. Specifically, the arson background and testimony of these experts were as follows:

(a) Brooklyn Center Fire Marshal Jerry Pedlar had extensive experience as both a fire fighter and fire in-

vestigator at the time he investigated the fire at Appellant's townhouse (T.710-14). He was familiar with the properties of gasoline and inflammability and had set 60-80 practice fires involving gasoline (T.717, 859). Based upon his experience and expertise, Mr. Pedlar testified that gasoline is "highly volatile" and that "once ignition has been made of the area [area with gasoline], that you get an automatic ignition of the fumes throughout the entire area" (T.717, 794).

(b) Sharadchandra Bhatt had a Bachelor's Degree in Engineering, a Master of Science Degree with a major in Industrial Engineering and had taken additional post-master's work in the same field at the time he reviewed the arson evidence in this case (T.922-23). Mr. Bhatt specifically had experience in testing and investigating the use of accelerants in fires, including gasoline (T.927). Mr. Bhatt testified that if there is ignition in an area containing gasoline, there would be instantaneous combustion of all the gasoline fumes (T.934-35) and it would not be possible for there to be an isolated fire in the downstairs area for any significant period of time (T.935).

(c) Arson consultant James Carlson had been a member of the Minneapolis Fire Department for thirty years where he was a fire investigator for twelve years and Chief Investigator for an additional five years (T.1061). Based upon his experience with gasoline fires, Mr. Carlson testified that ignition of an area with gasoline results in "immediate ignition of the entire room" (T.1071) and that this is a "rapid ignition that happens within a fraction of a second, resulting in a fire" (T.1070).

(3) The decision overlooked and misconceived testimony by the State's arson experts that in their professional opinion

Appellant could not have escaped the townhouse without suffering serious bodily harm. The decision specifically states that:

Upon discovery of the fire, appellant claims that he, in panic, rushed from the house. The state suggests the contention is irrational because appellant would have been injured had he left in that manner. Yet, there is evidence appellant had singed hair on the left side of his body, and that all the skin on the bottom of his feet turned brown and peeled off a few days after the fire.

Berndt, slip op. at 9. This court's reference to the singeing of Appellant's hair and his brown feet demonstrates that it either overlooked or misconceived the testimony by arson experts that Appellant could not have run through the entire length of the first floor without suffering *severe* bodily harm once the gasoline was ignited. Specifically, the arson experts testified as follows:

(1) Fire Marshal Pedlar testified that on the basis of the burn patterns and the findings of gasoline it was his professional opinion that Appellant could not have escaped from the townhouse in the manner he claims he did without being burned (T.783-84). Mr. Pedlar was aware that Appellant had incurred some singeing on his left hand, forearm and eye lashes when he testified that Appellant could not have escaped in the manner he claims he escaped (T.832).

(b) Arson expert James Carlson specifically testified as follows:

A. [by James Carlson] That under those circumstances, it would be impossible for a person to have been in the room at the time of the ignition of these

vapors and escaped without being killed or at least harmed.

* * *

Q. [by the prosecutor] I say, severely harmed?

A. *Yes, severely harmed.* [T.1077, emphasis added.]

Examination of State's Exhibit No. 18 reveals that gasoline was present by the sofa, in the hallway and by the front entrance (T.548, 549, 743, 744, 749). In order to go from the sofa to the front door, Appellant would have had to go through trailers of gasoline that would have already been automatically ignited. It is respectfully submitted that it is *not* rational to conclude that Appellant could have run through the areas of the most severe burning and only suffer singeing of the hair on one side of his body and brown feet. Moreover, the testimony of Appellant's own experts substantiate the State's experts' testimony that someone could not have been in the center of a gasoline fire at ignition without suffering severe injury. In support of the defense's theory that there was no gasoline in the house, both Robert Davis and Shelby Gallien testified that a person igniting a gasoline fire under the conditions in this case would either suffer serious injury or be killed (T.1325-29, 1488-89, 1796, 1918). In relying upon Appellant's claim of brown feet as proof that Appellant was injured, this court overlooked both the fact that there was no evidence showing that Appellant was treated by a doctor for his feet (T.1144) and the fact that Appellant waited over six weeks to tell the police about his feet at which time most of the alleged brown skin was gone (T.983-84). Also, Appellant only told the police about his brown feet after they told him that they thought it would be impossible for him to escape without injury (T.983).

(4) The decision overlooked testimony by experienced fire fighters and investigators that it is not unusual to *not* smell

gasoline either at the fire scene or on the person who started the fire once the gasoline has been ignited. In holding that the evidence of Appellant's guilt was insufficient, the decision placed great weight upon the fact that neither Appellant nor the fire scene smelled of gasoline after the fire was ignited. *Berndt*, slip op. at 6 and 9. But numerous fire fighters and fire investigators who were experienced in the ignition and extinguishing of gasoline fires testified that it was not unusual to *not* smell gasoline fumes once the fire has been ignited. Specifically, these witnesses testified as follows:

- (a) Stanley Owens, a fire fighter for 15-1/2 years who had staged 45-50 practice fires with gasoline, testified that it was *not* common to detect the odor of gasoline at these practice fires (T.141-42). Instead, he stated that the predominant odor at these fires was the material that was burning (T.141-42).
- (b) Gary Giving, a fire fighter for 16 years who had experience in extinguishing approximately a dozen gasoline practice fires, testified that he was never able to detect the odor of gasoline after these practice fires were extinguished (T.156). He stated that the dominant smell is "[h]eat, burnt smoke smell" (T.156) and that the smell of gasoline was only detected prior to ignition (T.165).
- (c) Chief Ronald Boman of the Brooklyn Center Fire Department testified that he had participated in ten to fifteen practice gasoline fires (T.173). He further testified that the odor of gasoline was never detectable either during or after the practice fires (T.173).
- (d) Fire Marshal Jerry Pedlar testified that from his experience in setting 60-80 practice gasoline fires, he knows that it's possible not to detect the odor of gasoline at the scene of a gasoline fire (T.774, 847). He testified

that in gasoline fires, the gasoline is consumed and the vapors are burned off during the fire (T.859).

(e) James Carlson testified that even though Appellant was the person suspected of pouring and igniting the gasoline, the fact that no one smelled gasoline on him was *not* unusual (T.1089).

(f) Defense expert Shelby Gallien conceded that it is possible that other smells such as smoke may "override" gasoline odors (T.1610).

(5) This court misconceived the significance of Brenda Berndt's cause of death. The medical examiner testified that the low level of carbon monoxide in Brenda Berndt was consistent with a "superheated death" (T.898, 903, 906). A superheated death occurs when there is an instantaneous combustion or a very hot fire which damages the victim's lungs and causes death before a lethal level of carbon monoxide can be absorbed by the lungs (T.896). The decision stated that:

Likewise, the autopsy report on Brenda was more consistent with appellant's theory than with that of the State.

Berndt, slip op. at 9. This statement demonstrates that this court misinterpreted both Appellant's theory of an accidental fire and the significance of Brenda Berndt's cause of death.

Defense expert Shelby Gallien's theory about a "flashback" fire was based upon the premise that there was a build-up of carbon monoxide gasses within the house to such a level that the gasses ignited (T.1400-05). Bruce Ryden, the Roseville Fire Marshal, testified that if the type of "flashback" fire that Mr. Gallien described had occurred, the build-up of gasses prior to ignition would cause persons present in the house at the time of the build-up to die of carbon monoxide poisoning prior to ignition (T.2112-13). Thus, if a "flashback" fire had occurred, Brenda would have died from inhaling a lethal level

of carbon monoxide before the fire ignited rather than from breathing superheated air.

The fact that Brenda died from breathing "superheated" air is inconsistent with Appellant's accidental "flashback" fire theory and is consistent with the State's evidence showing that Brenda Berndt's body was in the path of the gasoline trailer when it was ignited (T.757). Moreover, the fact that the boys' autopsies showed that their lungs contained lethal levels of carbon monoxide poisoning (T.881-82) is also consistent with the State's evidence of a gasoline fire. The suspicious burn patterns depicted in red ink on State's Exhibit No. 19 shows that the boys' bodies were not directly in the path of the suspicious burn patterns (T.304, 752). Thus, unlike their mother, the boys were exposed to the smoke of the fire but not to its intense heat before their deaths.

(6) The decision incorrectly states that the State's gas chromatography analyst "concluded that five of the samples indicated the presence of an accelerant—most probably gasoline." *Berndt*, slip op. at 5. The State's analyst testified *unequivocally* that the five samples contained gasoline (T.547, 548, 550, 551). He also noted that another sample contained lighter fluid (T. 574).

(7) The decision incorrectly assumes that the State claimed Appellant "carefully" poured the gasoline. *Berndt*, slip op. at pp. 5 and 6. The State's experts never testified that the gasoline must have been carefully spread throughout the townhouse. Indeed, evidence showing that the gasoline trailers varied in width from three to six inches to two feet and that gasoline was on the kitchen table demonstrates that the gasoline was not carefully poured (T.389, 775-76). Moreover, the fact that no one smelled gasoline on Appellant does not demonstrate that he poured the gasoline carefully since other evidence at trial established that the odor of gasoline is often

masked by the smoke and other smells once the gasoline is ignited (T.141-42, 156, 165, 173, 774, 847, 1089). *See Part III.A.(4) of this Petition.*

B. The Decision Overlooked and Misconceived Material Facts Concerning the Events Occurring Immediately Before and During the Fire.

The decision fails to mention several material facts that buttresses the State's evidence showing that the fire was a gasoline fire ignited by Appellant. Among these excluded facts are the following:

(1) The decision incorrectly states that:

Immediately after the fire, appellant appeared confused as to what action Brenda had taken. In general, however, in each version, he indicated Brenda was heading into the dining room while he panicked and ran from the house because of the heat and smoke.

This statement ignores the fact that on August 21, 1981, the day after the fire, Appellant told police investigators that Brenda was upstairs on the night of the fire (T.969, 1183). It further ignores the fact that even though Appellant subsequently learned that the fire investigators found Brenda's body on the first floor, he again told the police on August 27, 1986, that Brenda was upstairs at the time of the fire (T.618, 979, 1184). It was not until October 6, 1981, when Appellant was informed that gasoline had been found in the townhouse (T.981), that he told the police that Brenda was on the sofa with him and that he saw her run into the fire (T.984, 1185).

(2) Appellant was seen walking alone outside his townhouse prior to the fire by an eleven year old boy who lived in the Georgetown townhouse complex (T.203-07, 781).

(3) The only witnesses who were awake prior to the fire all testified that they heard an explosion-type noise at the

time the fire started. Officer Adams and two neighbors in the nearby Chippewa Park apartments testified that at approximately 2:45 a.m. they heard a loud noise or "boom" (T.57, 310, 314, 319, 321). The boom caused the windows to shake in the Chippewa complex (T.314, 321). As State Exhibit No. 1 shows, these four persons were all located within a block of Appellant's townhouse when they heard the boom. This evidence supports the evidence showing that the fire was a rapidly-spreading fire since within ten minutes of hearing this loud noise, persons from a block away could see that the townhouse was engulfed in flames (T.61, 315, 321-22). This evidence also negates the defense's theory that this was a slow-starting fire (T.1400).

(4) The decision incorrectly states that when Officer Adams returned to the scene, "the second story was not burning." *Berndt*, slip op. at 3. On the contrary, Officer Adams testified that the second story was in flames when he arrived. Specifically, Officer Adams stated that although he did not notice any smoke or flames when he left the scene at 2:48 a.m. (T.58), when he returned to the scene at 2:54 a.m.:

Every single window, door, opening of that place had fire or flames coming out of it besides that one window [the front window on the second floor]. That was the only one that didn't have anything coming out of it.

(T.61).

(5) The decision incorrectly states that "[b]oth Adams and appellant searched for a ladder to attempt to save the children on the second floor." *Berndt*, slip op. at 3. Appellant never searched for a ladder. Only neighbor Tim Crandall and Officer Adams looked for a ladder (T.62-63, 276). Moreover, when Officer Adams asked Appellant if there was a ladder, Appellant told him:

There's no ladder. You're not going to find any ladder around here. Besides, even if you did find a ladder, it's too late to save them. They're all dead.

(O.10, T.63-64).

(6) The decision overlooks the fact that not only did Appellant not make any attempt to save his family (T.1205) while two of his neighbors made such attempts (T.258-60, 274), he also adamantly refused to help save his family when he would not tell the police where his wife and the boys were located inside the house (T.65-66).

(7) The decision's holding that "[n]o evidence was produced that any person residing in the townhouse project area was missing any gasoline nor any container," *Berndt*, slip op. at p. 6, overlooks material evidence. First, the decision incorrectly states that "[t]he caretaker testified that none of his gasoline was missing." *Berndt*, slip op. at p. 7. The caretaker testified that Appellant had a key to one of the storage garages where there was a one-gallon can of gasoline (T.910). On the morning after the fire, the caretaker examined the can and saw that it was half empty (T.911). The caretaker also testified that there was a container in another garage that contained five gallons of gasoline and that this container was half empty the morning after the fire (T.911). The caretaker never stated that none of the gasoline was missing. Instead, he testified that:

When I say it was partially filled, I *gather* that my men had used that portion of the gasoline that was gone.

(T.918, emphasis added). Thus, the caretaker did not positively state that there was no gasoline missing.

More importantly, the decision overlooks the fact that Appellant's *own* car was parked near his townhouse on the night of the fire (T.972-73).

(8) The decision overlooks the fact that at the same time Appellant claimed that there was an isolated fire in the area of the dining room and kitchen, Appellant's next door neighbors Linda Kavai and Charlie Catron woke up to the roar of a fire and observed a fire from out their back window (T.242-43, 246, 253). Reference to State's Exhibits No. 3, 4, and 5 show that Ms. Kavai and Mr. Catron could not have possibly seen the fire from their bedroom window before Mr. Catron went outside if the fire had been where Appellant claimed it was before he allegedly ran out of the townhouse.

(9) The decision incorrectly states that:

As Berndt came out the door, his next-door neighbor heard him screaming for the fire department.

Berndt, slip op. at 3. Appellant's neighbor Charlie Catron specifically testified that when he came out of his townhouse, it "seemed" to him that Appellant was coming out of his townhouse (T.255). But Mr. Catron also testified that:

I didn't see [Appellant] come out the door, but we both went onto the lawn at the same time.

(T.255). Mr. Catron stated that when he first saw Appellant, Appellant was either on or very near the front step (T.255). At no point did Mr. Catron testify that Appellant was screaming for the fire department when he came out of the front door (T.255-56). Thus, the only evidence showing that Appellant came out of his townhouse at the same time Mr. Catron came out of the townhouse next door is Appellant's testimony.

(10) The decision overlooks the fact that if Appellant did not pour the gasoline and ignite the fire, a third person would have had to break into the house, pour gasoline upstairs on the stairs, around the first floor and near the sofa without waking up either Appellant or Brenda who were allegedly sleeping on

the sofa. Even Appellant admitted that it was unlikely that this could have happened (T.1224-25).

C. The Decision Overlooked and Misconceived Material Facts Concerning Appellant's Relationship with the Victim Brenda Berndt.

The decision overlooked and misstates material evidence concerning Appellant's relationship with his wife. Among these facts are the following:

- (1) The decision incorrectly states the following:

The state in this case sought to establish a motive by introducing evidence relating to Berndt's relationship with Brenda, in particular, his propensity to flirt and be promiscuous. Incidents in corroboration of this contention occurred long before the fire date. Moreover, appellant did not deny the incidents, but contended those problems had been resolved well before the fire. *No evidence rebuts that assertion.*

Berndt, slip op. at 7 (emphasis added). The evidence showed that there had been major problems with promiscuity throughout Appellant's and Brenda's seven year relationship. First, as soon as Brenda and Appellant began living together in 1974, Appellant attempted to have a sexual relationship with Brenda's sister Marla Henne (T.610, 612). After he and Brenda married in 1975, Appellant again physically grabbed Marla Henne in 1978 (T.615) and repeatedly called her to ask her to meet him in a motel for a sexual relationship (T.616, 1155-56). Although Appellant ceased making overtures to Ms. Henne in late 1978, Ms. Henne did not tell Brenda about Appellant's propositions until 1980 (T.617, 624). In addition, there was evidence that in 1979 Appellant physically grabbed a thirteen year old babysitter (T.511-14) and Appel-

B

lant admitted having three extramarital affairs during his six year marriage with Brenda (T.1150-51).

More importantly, despite Appellant's claim that he and Brenda had worked everything out a year before the fire (T.1113-14, 1157-59), there was significant evidence to rebut this assertion. Specifically, there was evidence that Brenda had a sexual relationship with a mutual acquaintance named Scott Tollin several months before her death (T.653, 655). Also, a couple of months before Brenda's death, Appellant physically grabbed the breasts of Sandra Jacobs in Brenda's presence (T.659, 1157). The evidence also showed that before Brenda's death, Appellant and Mr. Jacobs spent time together at Ms. Jacobs' home without Brenda being present (T.1263-64). Finally, the evidence showed that either on the night of the fire or shortly before that night, Appellant suggested to Glenn Snow that the two of them do some wife swapping (T.632-35).

Also, although the decision correctly states that no one observed any argument between Appellant and Brenda at the Earl Brown Bowl, it overlooks the fact that Brenda's ex-lover Scott Tollin was present at the bar that night (T.630, 640). It also overlooks the fact that Appellant took one of the women from the bar out to his car for a ride where they were alone together for at least fifteen minutes (T.642, 1122-23).

(2) The decision incorrectly states the following:

Appellant claimed he was unaware of his wife's life insurance policy furnished by the State of Minnesota where she was employed. He was not even a named beneficiary on this policy.

Berndt, slip op. at 7. At no point in Appellant's testimony did Appellant ever claim that he was unaware of his wife's insurance policy through the State of Minnesota (T.1108-1223).

To the contrary, Appellant told police investigators on the morning after the fire that Brenda did have a life insurance policy through her employer (O.118).

Also, although the policy did not specifically name Appellant as beneficiary, the decision overlooks the fact that Appellant as Brenda's spouse had first priority as her beneficiary (T.705-06). It also overlooks the fact that with both Brenda and the boys dead, Appellant would be the only immediate family member left to collect the insurance.

(3) The decision's statement that the trial court may have "arguably" abused its discretion in admitting evidence as to Appellant's extramarital affairs overlooks the fact that the trial court excluded other evidence pertaining to Appellant's previous conduct. Specifically, the trial court ruled that the State could not introduce evidence showing that Appellant attempted to make a bomb to kill a police officer whom he suspected was having an affair with his first wife (O.202-07, 250-51). Also, the State agreed not to introduce evidence showing that Appellant had assaulted his first wife (O.201).

IV. EXAMINATION OF THE MATERIAL EVIDENCE
THAT WAS OVERLOOKED AND MISCONCEIVED
BY THIS COURT MAKES CLEAR THAT THE EVI-
DENCE VIEWED IN THE LIGHT MOST FAVOR-
ABLE TO THE VERDICT WAS SUFFICIENT TO
SUSTAIN THE JURY'S VERDICTS.

This court's general standard for reviewing a claim of insufficient evidence in a criminal case is set forth as follows:

In reviewing a claim of insufficient evidence we must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude that the defendant was guilty of the offense charged. *State v. Merrill*, 274 N.W.

2d 99 (Minn. 1978). The evidence must be viewed in the light most favorable to the prosecution and it is necessary to assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Wahlberg*, 296 N.W.2d 408 (Minn. 1980).

State v. Ulvinen, 313 N.W.2d 425, 428 (Minn. 1981). Although the evidence of Appellant's guilt was circumstantial in nature, this court has repeatedly held that:

The circumstantial evidence in a criminal case is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt.

State v. Morgan, 290 Minn. 558, 561, 188 N.W.2d 917, 919 (1971). See *State v. Jacobson*, 326 N.W.2d 663, 665 (Minn. 1982) (circumstantial evidence showing that fire had been intentionally set and that defendant had financial motive to set fire held sufficient to sustain arson verdict). This court has also repeatedly held that normally a jury is in the best position to evaluate the circumstantial evidence surrounding the crime and the jury's verdict is entitled to due deference. See e.g. *State v. Daniels*, 380 N.W.2d 777, 781 (Minn. 1986); *State v. Anderson*, 379 N.W.2d 70, 75 (Minn. 1985).

Examination of the evidence in this case pursuant to the above-stated standards compels a finding that the evidence was sufficient to sustain the verdict. It is respectfully submitted that this court's holding of insufficiency was premised upon both its overlooking of material facts and its misconception of the arson testimony. Accordingly, the State respectfully requests that this holding of insufficiency be either reversed or modified.

That the insufficiency holding was premised upon a misconception of the evidence is demonstrated by the following decision excerpt:

The state produced evidence which, if credited by the jury, would sustain its contention that the townhouse fire had been ignited with the use of gasoline accelerant . . . Some circumstances proved were consistent with the state's claim of an intentional fire, but other circumstances proved were generally consistent with the rational hypothesis that the defendant was not guilty.

Berndt, slip op. at 10. Despite this court's agreement that consideration of the evidence in the light most favorable to the verdict supports a finding that this was an arson gasoline fire, it relies upon evidence supporting the defendant's theory of an accidental fire to justify the holding that there were "other circumstances" consistent with the rational hypothesis that Appellant was not guilty. But the jury rejected the credibility of the evidence showing "other circumstances" since this evidence was inconsistent with the evidence that showed that the fire was a gasoline fire.

Based on the rapidly spreading fire, the classic suspicious low burn patterns and the positive gasoline findings, the State's experts testified that it was their conclusion that this was an arson gasoline fire. One defense expert disputed the gasoline findings and the other defense expert claimed that the fire could have been caused by a smoldering cigarette. The issue at trial became one of credibility between the two sets of experts. The jury's verdicts demonstrated that it accepted the expert conclusions of the State's experts and rejected the opinions put forth by the defense experts that were contrary to these conclusions.

Examination of all of the evidence in the record below shows that the jury could have reasonably credited the evidence proving that this was an arson gasoline fire and have reasonably rejected the defense testimony that was contrary

to a finding of arson. More importantly, the record shows that the evidence proving that this was a gasoline fire is consistent with the hypothesis that Appellant is guilty and is inconsistent with any *rational* hypothesis except that of his guilt.

A. The Circumstantial Evidence Proving that this was a Gasoline Fire Compels the Conclusion that Appellant Poured the Gasoline and Ignited the Fire.

That this court overlooked material evidence in this case is evident from the following excerpt from the decision:

Except for the fact that appellant was physically present in his home when the fire started, there exists no other circumstances consistent with the state's hypothesis of guilt.

Berndt, slip op. at 8. Appellant's guilt was not proven by his presence in the home. On the contrary, his guilt was proven by the evidence showing that he could not have possibly been present inside the townhouse when it was ignited. The positive gas samples and the suspicious low burn patterns showed that gasoline was poured throughout the first floor with the largest amount poured in the living room near the sofa where Appellant claimed he was sleeping (T.372-75, 408, 549). See State's Exhibit No. 18. Since the State's experts testified that a fire in an area filled with gasoline would result in the immediate ignition of the entire area (T.717, 794, 934-35, 1070, 1071), the living room would have ignited while Appellant was still on the sofa. State's Exhibit No. 18 shows that had Appellant been on the sofa at the time the fire began, he would have had to run through a living room full of fire, a hallway full of fire and a front entryway full of fire to get out the front door.

The State's experts testified that Appellant could not have escaped in the manner he claimed he did without suffering severe injury (T.782, 783-84, 1077). These experts were aware

that Appellant had incurred slight singeing of his hair on his left side and claimed to have brown feet but they obviously did not consider this to constitute severe injury (T.782). Instead, it was reasonable for the jury to infer that the singeing on the left side was more consistent with Appellant standing outside throwing a match onto the gasoline than it was with him running through a house full of gasoline fire. Moreover, it is submitted that it was *rational* for the jury to conclude on the basis of the experts' testimony that Appellant's injuries would have consisted of more than brown feet had he run through the entire length of the townhouse while it was ablaze with ignited gasoline.

The decision's statement of the facts show that this court accepted Appellant's claim that he was on the sofa when the fire started. See *Berndt*, slip op. at 2-3. It is respectfully submitted that this court *cannot* accept Appellant's story of escape as true if it views the evidence in the light most favorable to the verdict. Acceptance of Appellant's claim requires rejection of the evidence showing that this was a gasoline fire since there could not have been an isolated limited fire in the dining room for any period of time if gasoline was spread throughout the house (T.717, 794, 934-35, 1070-71).

Because the evidence shows that Appellant could not have been inside the townhouse at the time the fire was ignited, the only rational inference is that he was outside of the house. Evidence showing both that he was outside of the house and that he lied about being inside the house at the time of the fire leads to only one rational conclusion—that Appellant ignited the fire and lied about being inside in an effort to divert suspicion from himself. What other rational hypothesis could

there be?⁵ It is *not* rational to conclude that Appellant stood outside watching while some third person broke into the house, spread the gasoline throughout the house, and ignited it.

In rejecting the jury's finding that the circumstantial evidence ruled out any rational hypothesis except that of Appellant's guilt, this court relied upon the following factors: (1) no one detected the odor of gasoline either on Appellant or at the fire scene; (2) there was no evidence showing exactly where Appellant obtained the gasoline; (3) no empty gasoline containers or siphoning equipment was found at the fire scene and (4) Appellant had insufficient motive to commit the offense. If the jury's finding that this was a gasoline fire is accepted on appeal, none of the above-cited factors make rational the hypothesis that someone other than Appellant was the arsonist.

(1) No odor of gasoline.

The State's arson experts were aware that no gasoline odor was detected either on Appellant or at the fire scene. But these experts, all of whom had extensive experience in extinguishing gasoline fires, testified that it is not unusual to *not* smell gasoline either at the fire scene or on the person who poured and ignited the gasoline once the gasoline has been ignited (T.141-42, 156, 165, 173, 774, 847, 1089). The expert testimony established that when gasoline is ignited, the predominant odor becomes that of smoke and heat and these smells will mask any gasoline odors (T.141-42, 156, 859). Although the defense expert Mr. Gallien testified that if this was a gasoline fire the witnesses should have been able to detect gasoline odors both at the scene and on Appellant

⁵ Although this court stated that there were "other circumstances . . . generally consistent with the rational hypothesis that the defendant was not guilty," *Berndt* slip op. at 10, the decision never explained what this rational hypothesis was.

(T.1321-23), Mr. Gallien also admitted that he no longer had the ability to smell anything (T.1324). More importantly, the jury obviously rejected Mr. Gallien's opinion on this issue.

It is inconsistent for this court to accept the jury's finding that this was a gasoline fire even though no gasoline odor was detected at the scene and yet refused to accept its finding that Appellant was the arsonist on the basis that no one detected gasoline odors on him. Although this court implied that it was not rational to infer that Appellant, with a blood alcohol content that at its highest could only have been .12 or .13, could have poured five gallons of gasoline "without spilling some of it on his person or clothing," *Berndt*, slip op. at 6, the alternative is even less rational. Even if the court could assume that Appellant's story of being inside the house was feasible, he would have had to run barefoot over carpeting drenched with gasoline in order to escape from the house. It is highly improbable that Appellant could have run through this gasoline without getting some of it on his feet.

Finally, the court's holding that the absence of gasoline odors makes it irrational to infer that Appellant was the arsonist is inconsistent with its recent decision in *State v. Daniels*, 380 N.W.2d 777 (Minn. 1986). In *Daniels* the defendant was accused of setting an apartment on fire with middle petroleum distillate consistent with mineral spirits. See *Daniels*, 380 N.W.2d at 780. In that case, as in this case, the defendant had been drinking alcohol for several hours prior to the fire. See Transcript for *State v. Daniels*, pp. 81-83, reprinted in Petitioner's Appendix. Also, as in this case, the defendant did not have any odor of petroleum distillate or mineral spirits and testing of his clothing did not reveal any finding of a petroleum distillate. See Transcript for *State v. Daniels*, pp. 179, 194, 359, 361, 393, 398, 401, reprinted in

Petitioner's Appendix. Despite the absence of any petroleum odors on the defendant in the *Daniels* case, this court held that the evidence was "consistent only with Daniels' guilt and inconsistent with any rational hypothesis except that of guilt." *Daniels*, 380 N.W.2d at 782.

(2) Absence of Evidence Showing Exactly Where Appellant Obtained the Gasoline.

It is submitted that the absence of evidence showing *exactly where* Appellant obtained the gasoline does not make irrational the jury's finding that Appellant was the arsonist. The evidence showed that a relatively small amount of gasoline—five gallons—was used in the fire (T.930). The evidence also showed that Appellant had a number of ready sources from where he could have obtained this gasoline, including the caretaker's garage (to which he had a key) (T.910-11) and nearby cars (T.1230-32). One of the nearby cars was Appellant's own car (T.972-73). Five gallons of gasoline is not a large amount—it is less than half a tankful for most cars. The fact that no one reported gasoline missing does not make the jury's finding of guilt irrational. Appellant could have easily taken gasoline from the caretaker's garage or he could have taken small amounts of gasoline from several parked cars. The jury could have reasonably inferred from common experience that someone could siphon one to two gallons from a car tank without the car's owner noticing that any gasoline was gone. More importantly, Appellant could have easily obtained all five gallons from his own car's gas tank. The jury could have reasonably concluded that had Appellant done so, he would not have reported the gasoline loss after the fire.

Although evidence showing exactly where Appellant obtained the gasoline would have strengthened the State's case, absence of this evidence does not justify a finding of insuf-

ficiency. This is not a case where the evidence showed that Appellant could not have obtained gasoline that night. To the contrary, there was ample evidence showing that Appellant had several ready sources from which he could have obtained the five gallons of gasoline.

Again, this court's reliance upon the absence of evidence showing exactly where Appellant obtained the five gallons of gasoline to reverse the convictions is inconsistent with its recent decision in *Daniels*. In *Daniels*, the State did not show exactly where the defendant obtained the petroleum distillate. Instead the State in *Daniels*, as in this case, showed that Appellant had access to these flammable liquids even though there was no positive showing that the liquids in the apartment storeroom were in fact the liquids that were used in the fire. *See Daniels*, 380 N.W.2d at 780.

(3) Absence of Gasoline Container and Siphoning Equipment.

Although the finding of a gasoline container and/or siphoning equipment would have made the State's case stronger, the absence of this evidence again does not justify a finding of insufficiency. The jury could have considered a number of rational explanations as to why no empty containers or siphoning equipment were found. Appellant could have used a combustible container which would have been consumed in the fire. Similarly, siphoning equipment could have been consumed in a fire. Also, Appellant could have disposed of these items either in the trash that was hauled away (T.778-80, 913-15, 920) or in another location not found by the investigators.

Since the evidence shows that this was a gasoline fire, it is clear that the gasoline was brought to the townhouse in some type of container. Because the absence of such a container does not make irrational the jury's finding that this

was a gasoline fire, absence of a container also does not make irrational its finding that Appellant was the arsonist. Again, the court's reliance upon this factor in reversing Appellant's conviction is inconsistent with its holding in *Daniels*. As in this case, no empty gasoline container was found near the scene of fire in *Daniels*. That the partially filled containers found in the storeroom in *Daniels* were the containers used was based upon reasonable inference and not positive proof. See *Daniels*, 380 N.W.2d at 781.

(4) Appellant's Motive.

In its decision, this court stated that it had "the firm impression that the state failed to establish a credible motive for causing Brenda's death." *Berndt*, slip op. at 7-8. This impression was based upon this court's acceptance of Appellant's claim that he and Brenda had resolved their problems a year previous to the fire. See *Berndt*, slip op. at 7. As previously noted in Section II(C)(1) of this Petition, there was ample evidence in the record rebutting Appellant's claim. The evidence showed that in the months immediately before the fire, Brenda had a sexual affair with another man (T.653, 655) while Appellant physically grabbed another woman's breast (T.659) and talked about wife swapping (T.632-35). The evidence at trial showed that Appellant's and Brenda's seven year relationship was a troubled one that was marked by infidelity by both parties (T.653, 655, 1150-51). The evidence also showed that when Appellant drank, he would become moody and would direct his anger at Brenda (T.218-25, 684, 961). Appellant was having financial problems at the time of the fire (T.1168) and the insurance money provided him with a financial motive to kill Brenda (T.702-06). The jury could have reasonably inferred that Appellant may have concluded

that if the boys also perished in the fire, it would make Brenda's death appear to be less suspicious.

More importantly, the jury found that this was an arson fire so *someone* had to have the motivation to murder the victims. Appellant was the only person who would gain from their deaths. There often is not a rational explanation for the crime of familicide and the precise motivation is usually unknown unless the perpetrator confesses. See generally, Malmquist, *Psychiatric Aspects of Familicide*, Bulletin of the AAPL Vol. VIII, No. 3 at 298. Although at oral argument Appellant's counsel argued that Brenda's ex-husband Harry Gage had a motive to commit the murders, there is absolutely nothing in the record to connect Mr. Gage to the fire. Also, since Appellant could not have been inside the house at the time it was ignited, acceptance of a theory that someone else started the fire requires acceptance of the theory that Appellant stood outside, watched as someone murdered his family and then lied to the police to cover up the murders. It is respectfully submitted that this hypothesis is not rational and was properly rejected by the jury.

Finally, as this court noted, the State "has no burden of establishing a motive for the crime." *Berndt*, slip op. at 7. The evidence established that Appellant was outside at the time the fire was ignited and that he lied about being inside at the time of the fire. This evidence conclusively shows that Appellant was the arsonist and the absence of a clear motive does not justify rejection of this evidence.

- B. The Jury Could Have Reasonably Credited the Testimony Proving that this was an Arson Gasoline Fire and Have Reasonably Rejected any Contrary Testimony.

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Although this court states that the evidence most favorable to the jury verdict shows that this was a gasoline fire, other comments in the decision demonstrate that this court did not reject the evidence that was contrary to the jury's verdict. The evidence in this record showed two directly opposing positions. The first position was that gasoline was present in the townhouse and that the fire was an arson gasoline fire. The second position was that there was no gasoline present in the townhouse and that the fire was consistent with an accidental fire. The jury credited the evidence supporting the first position and rejected evidence supporting the second position. Because examination of the record demonstrates that the jury could have rationally accepted the State's arson evidence and rejected the defense's theory of accidental fire, this court in reviewing the evidence must also reject evidence inconsistent with the State's arson evidence.

(1) The Jury Properly Credited Richard Tontarski's Expert Opinion that the Samples Contained Gasoline.

The 26 gasoline samples taken from the townhouse were analyzed by Richard E. Tontarski, a forensic scientist employed by the United States Bureau of Alcohol, Tobacco and Firearms (ATF) at the National Laboratory Center in Rockville, Maryland (T.527). Mr. Tontarski had completed the necessary course work to be classified as a chemist and received a Masters Degree in Forensic Science from George Washington University in 1978 (T.532). He has worked as a scientist for the ATF since 1978 and at the time of trial had analyzed fire scene samples for approximately 300 to 400 arson cases (T.530).

Mr. Tontarski testified to both his sampling procedures and his identification procedures (T.535-542, 554, 572-73, 574-75, 578, 580). Based upon his identification procedures, he positively identified the presence of gasoline in five samples

from the fire scene (T.547, 548, 550, 559). He testified that he made the positive identification when he compared the chromatograms produced by the samples with a 25% gasoline standard (75% evaporation of gasoline) (T.1081). He made this comparison by doing a side-by-side comparison of the unknown chromatogram to the known standard (T.538). He testified that the samples could not be analyzed by overlapping their chromatograms with a known standard because there are variations in machines and injection points (T.2081, 2096-99, 2150-51).

Robert Davis testified as a gas chromatography expert for the defense (T.1672). Mr. Davis received a Bachelor of Science Degree from Illinois Wesleyan University in 1955 and worked as an analytical chemist for the army, Pure Oil Company and Allied Chemical from 1955 to 1960 (T.1673-74). In 1962, Mr. Davis formed his own company where he conducted quality control work for oil companies (T.672-73). In 1971, his company also began conducting analytical work in the area of forensic science (T.1072-73, 1861).

Mr. Davis compared the chromatograms produced by the fire samples with the set of gasoline samples used by Mr. Tontarski (T.1731). Mr. Davis testified that he disagreed with Mr. Tontarski's findings and stated that the chromatograms did not show gasoline (T.1751, 1755, 1759, 1772, 1777, 1783, 1790, 2217).

Although the jury had two opposite expert conclusions to choose from, the record shows that there were several flaws in Mr. Davis' analysis of the chromatograms that seriously undermined the credibility of his opinion:

- (1) When Mr. Davis made his initial determination that there was no gasoline, he was unaware of which gasoline standard Mr. Tontarski based his opinion on (T.1878). When he demonstrated to the jury that the

chromatograms from the samples did not contain gasoline, he compared the samples to a 100% gasoline standard (T.1743, 1755, 1759, 1772, 1777, 1783, 1790). When informed by the prosecutor that Mr. Tontarski based his comparison upon a 25% gasoline standard, Mr. Davis admitted that he should not have used the 100% gasoline standard in making his comparison (T.1898, 1910).

(2) Despite the fact that Mr. Tontarski testified that the chromatograms and standards should be analyzed in a side-by-side comparison rather than by overlapping the standards (T.2096-99, 2150-51), Mr. Davis conducted his comparison by overlapping the standards (T.1741, 1754, 1758, 1771, 1772, 1783, 2009-27).

(3) Mr. Davis never: (a) looked at Mr. Tontarski's manual explaining his sample preparation and comparison techniques (T.1900-01); (b) contacted Mr. Tontarski to ask about his techniques (T.1893, 1970-71); and (c) looked at the cans containing the samples prior to trial (T.1800).

(4) Mr. Davis admitted that he requires more matching peaks in a comparison before making a finding of gasoline than is legally required by the courts (T.1878, 1897).

From this, the jury could have reasonably concluded that Mr. Davis did not have sufficient background information about Mr. Tontarski's techniques to render a competent opinion as to whether there was gasoline in the samples. That Mr. Davis did not have sufficient information to offer a valid opinion is supported by his post-trial testimony which showed both that he never looked at Mr. Tontarski's manual prior to trial (M.4, D.6), and that he made incorrect assumptions

about Mr. Tontarski's sampling technique (M.7-8, 26, 40-43; D.15, 14-19). Moreover, from Mr. Davis' in-court comparison of the sample chromatograms with the wrong gasoline standard, the jurors may have reasonably inferred that Mr. Davis was attempting to confuse or mislead them. Thus, the jury could reasonably have both accepted Mr. Tontarski's opinion and rejected Mr. Davis' opinion pertaining to the presence of gasoline. Since the defense never challenged Mr. Tontarski's credentials as an expert at trial, the jury's acceptance of Mr. Tontarski's opinion should not be disregarded by this court.

(2) The Jury Could Have Reasonably Credited the Testimony by the State's Arson Experts That the Physical Evidence at the Scene was Consistent with a Gasoline Fire and Inconsistent with an Accidental Fire.

Jerry Pedlar, Fire Marshal for the Brooklyn Center Fire Department, personally observed the arson scene and concluded that the "fire was started as a result of flammable liquids" (T.783). Two independent arson consultants, James Carlson and Sharadchandra Bhatt, reviewed the reports, photos and videotapes in this case (T.930, 1076-76). Both consultants agreed that the evidence was consistent with a gasoline fire and was inconsistent with either a cigarette or electrical fire (T.944-45, 1076, 1093, 1095). These expert opinions were based upon the following physical evidence:

(a) Numerous suspicious low burns that could not be explained by the presence of a combustible in the area or by the dropping down of items (T.363-65, 372-75, 387, 393, 397, 400-01, 752-53, 755), especially the deep scarring and rutting in the living room area (T.372-74).

(b) The presence of "trailers" on both the ground level including the stairway which were sixty feet in

length with widths from three to six inches to two feet (T.775-76).

(c) The unusual burn on and under the kitchen table that was consistent with the presence of a liquid accelerant (T.388-90).

(d) The burning of the fire through the tread on the stairs which could only be explained by the seeping of a flammable liquid through the carpet and down into the stair treads (T.388-89).

(e) The presence of gasoline in the front door entry-way (T.548, 765), on the kitchen windowsill (T.391-92, 546-47), in the living room by the sofa (T.408, 549), on the stairway (T.388-89, 549-50) and by the door to the bedroom where two of the boys were trapped (T.551, 752).

(f) The determination that none of the electrical appliances, outlets or wiring could have been the cause of the fire (T.422).

(g) The inability to find any other accidental cause for the fire (T.423).

(h) The observations by the policemen, firemen and neighbors showing that the fire spread through the house at an extremely rapid rate (T.58, 59, 60-61, 70, 90-91, 106, 136, 164, 185, 186, 210-211, 214, 243, 245, 249, 256, 259, 275-76, 283, 312) and the firemen's observations that

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this was the worst residential fire that they have ever seen (T.114, 139-40, 149, 155, 172, 730).⁶

Although defense expert Shelby Gallien testified that the physical evidence was consistent with an accidental fire and was not consistent with a gasoline fire, the record demonstrates that considerable evidence cast doubt upon the credibility of Mr. Gallien's expert opinion:

(a) Mr. Gallien testified that the flammability range for gasoline was 1-3/4% to 4% (T.1430-31). The correct figure is 1.4% to 7.6% (T.1435, 1858). The defense's other expert, Mr. Davis, testified that Mr. Gallien's testimony on the flammability range constituted a "50 percent" error which in his opinion was a "gross error" (T.1858-59).

(b) Despite the fact that Mr. Gallien had copies of the reports in this case for over six months prior to trial, he was unable to reach any conclusion as to the cause of the fire until a few days before he testified (T.1466-67, 1471).

⁶The decision notes that "[t]he time lapse between the alarm and the response of the fire fighters is in dispute." *Berndt*, slip op. at 3, n. 3. It is respectfully submitted that consideration of the evidence in the light most favorable to the verdict compels a finding that the police arrived on the scene at 2:56 a.m., five minutes after the fire was reported (T.106, 134-35, 151, 169, 110, 170-71). It was rational for the jury to make this finding since State's Exhibit No. 1 shows that the fire station was only one block from the townhouse (T.168-69) and the first firemen on the scene lived within a block of the fire station (T.168-69, 100, 152, 170-71). Also, although the neighbors stated that it took the fire department a long time to arrive, their presence at the fire could have easily altered their perception of time (T.216, 1098). More importantly, the police officers and firemen who testified that the firemen arrived within a short period of time were in constant contact with the dispatcher, whose job it was to correctly record times of arrival (T.65, 92, 110, 152, 171).

(c) Mr. Gallien testified on direct examination that this was a slow starting fire which could have been started by either a short in an electrical circuit, grease burning in the frying pan or a cigarette smoldering on the rug (T.1399-1401). When the prosecutor on cross examination pointed out that the fire scene reports contained information ruling out both an electrical or grease fire, Mr. Gallien abruptly repudiated two of his three theories concerning the fire's possible origin (T.1632-33, 1657-63).

(d) Mr. Gallien's only remaining theory concerning the fire's origin—that of a flashback fire caused by a smoldering cigarette—was contradicted by the following evidence:

(i) Buildup of gases for a flashback fire cannot occur when windows are open (T.1958-59, 2111). Testimony at trial showed that several windows in the townhouse were open at the time of trial (T.337); and

(ii) Buildup of sufficient gasses on the first floor to cause a flashback fire would have caused persons present on the first floor to die of carbon monoxide poisoning before the fire could ignite (T.1095, 2112). But Appellant, who claims he was present on the first floor of the townhouse, survived the fire. Also, Brenda died from breathing superheated air and not from carbon monoxide poisoning (T.898, 903, 906).

(e) Mr. Gallien's theory of an accidental fire was based upon the belief that there was no gasoline present in the townhouse (T.1348-49, 1357, 1367, 1369-70, 1392, 1422, 1644). But other evidence at trial showed that five fire scene samples contained gasoline (T.391-92, 408, 546-47, 548, 549-51).

The above demonstrates that the jurors, who actually observed the witnesses testify, could have rationally accepted the opinions of the State's experts. Moreover, the jury could have reasonably rejected any contrary opinions by Mr. Gallien since his testimony demonstrated both that he was not fully familiar with all the fire scene evidence when he reached his conclusions and that he was not fully acquainted with all the properties of gasoline. Since the jury had a rational basis upon which to reject Mr. Gallien's opinion, it is respectfully submitted that the requirement that evidence must be viewed in the light most favorable to the jury's verdict does not permit reliance upon Mr. Gallien's rejected theories as justification for a finding of insufficiency.

(3) The Jury Could Have Reasonably Concluded that Appellant's Story of Escape was not Credible.

The defense's accidental fire theory was premised upon Appellant's testimony that when he woke up, he saw a limited fire and ran through the house before the fire could spread. But the following physical evidence in the record casts doubt upon the credibility of this testimony:

(a) The findings of gasoline and the experts' opinions show that there could not have been a limited fire in the townhouse for any period of time (T.717, 794, 934-35, 1070-71).

(b) Appellant did not suffer significant injuries. The findings of gasoline and the experts' opinions show that Appellant could not have escaped the house in the manner he claims he did without suffering *severe* bodily harm (T.782-84, 1077).

(c) Appellant's testimony that he saw a limited fire in the portion of the dining room near the kitchen and then came out of the house at the same time his neighbor

Charlie Catron came out of his townhouse (T.335, 970, 1129-30, 1132-33) is inconsistent with Mr. Catron's testimony. At the same time Appellant allegedly saw a limited fire, Mr. Catron and Linda Kawai looked out their bedroom window and saw the fire (T.242-43, 247, 253). Reference to the location of Mr. Catron's window in State's Exhibits Nos. 3, 4, and 5 demonstrates that neither Mr. Catron nor Ms. Kawai could have possibly seen the fire from this window had it been confined to the dining room area by the kitchen. The fire clearly must have already spread throughout the rear of the living room by the time Mr. Catron and Ms. Kawai observed it.

(d) Appellant's story about Brenda getting up and running directly into the fire is inconsistent with the physical evidence showing that she would have had to run through and past a wall of fire in order to end up where she did on the dining room floor. See State's Exhibit 18. The physical evidence also shows that it is not rational to conclude that Brenda would get up and run through a wall of fire to reach the dining room since the boys were located in an opposite part of the house and there was no exit through the dining room.

In addition to the fact that the physical evidence contradicted Appellant's story, other evidence at trial cast doubt upon Appellant's credibility. This evidence includes the following:

(a) After telling the police on both August 21 and 27, 1981, that Brenda was upstairs at the time of the fire, (T.769, 1183), Appellant waited until six weeks after the fire to tell the police that he now thought Brenda was downstairs with him on the sofa (T.984, 1185).

(b) Although Appellant claimed his feet turned brown after the fire, there was no evidence showing that

he had his feet examined by a doctor (T.1144). Also, he did not tell the police about his feet until after the brown skin was gone (T.983-84).

(c) Appellant's claim that he and Brenda had worked out all their problems a year before the fire was rebutted by evidence showing that he both physically accosted another woman in Brenda's presence a couple months before the fire and discussed wife swapping with another man shortly before the fire (T.632-35, 659, 1113-14, 1157-59, 1263-65).

Although the decision appears to rely heavily upon Appellant's testimony in support of its holding that there was a rational hypothesis consistent with Appellant's innocence, the verdict demonstrates that the jury did not find his story of escape to be rational or credible. The significant inconsistencies in Appellant's statement to the police alone gave the jury "substantial grounds to doubt the veracity of [his] story." *State v. Race*, — N.W.2d — (Minn., filed March 21, 1986) (slip op. at 13) (citing *State v. Langley*, 354 N.W.2d 389, 394 (Minn. 1984)). Since the evidence viewed in the light most favorable to the jury's verdict shows that Appellant's claim of escape was impossible, it is respectfully submitted that this court cannot base a holding of insufficiency upon Appellant's impossible claim that there was a limited fire from which he was able to escape without serious injury.

V. BECAUSE THE EVIDENCE WAS TECHNICALLY SUFFICIENT TO SUSTAIN THE JURY'S VERDICTS, THE INTERESTS OF JUSTICE REQUIRE EITHER THAT THE VERDICTS BE REINSTATED OR THAT THE CASE BE REMANDED FOR TRIAL.

Acceptance of the evidence showing that this was an arson gasoline fire compels the conclusion that Appellant was the arsonist. Thus, application for this court's usual standard of

review requires reinstatement of the convictions upon this rehearing. However, if this court declines to reinstate the convictions, the State respectfully requests that this court recognize that its reversal was based upon its re-evaluation of the weight of the evidence as a "thirteenth juror" and remand this case for retrial. *See Tibbs v. United States*, 457 U.S. 31 (1982).

A. Remanding this Case for Retrial is Permissible under the Double Jeopardy Clause.

This court's doubt of Appellant's guilt could only be premised upon the rejection or questioning of both the State's gas chromatography expert's findings and the arson experts' opinion that a person could not run through a house ablaze with ignited gasoline without suffering severe injury. Although the State does not contest this court's authority to depart from its self-imposed review standard and act as a "thirteenth juror," it is respectfully submitted that this court's doubts about the arson experts' testimony should not result in Appellant receiving immunity for his crimes when the evidence was legally sufficient to sustain the verdict. Instead, the interests of justice require that the case be remanded for retrial so that a new jury can evaluate the credibility of the State's expert witnesses. *See generally Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) ("[b]ut justice, though due to the accused, is due to the accuser also").

Although the Sixth Amendment's Double Jeopardy Clause precludes retrial when a reversal is based on insufficient evidence, retrial is permissible when reversal is based on the weight of the evidence. *See Tibbs v. Florida*, 457 U.S. at

46-47.⁷ The purpose of the Double Jeopardy Clause is to prevent the State from having an attempt to prove its case through successive prosecutions when it has failed to present technically sufficient evidence in the first trial. *See generally Burks v. United States*, 437 U.S. 1, 11 (1978). But when a reversal is based upon the weight of the evidence, the prosecution has already

presented sufficient evidence to support conviction and has persuaded the jury to convict. The reversal simply affords the defendant a second opportunity to seek a favorable judgment.

Tibbs, 457 U.S. 43 (footnote omitted). Here, the State has presented sufficient evidence of Appellant's guilt and has already persuaded one jury to convict. This court's disagreement with the jury's assessment of the weight of the evidence should not be deemed the equivalent of an acquittal since this court re-evaluated the evidence without personally observing the witnesses' demeanor.

It is anticipated that Appellant will argue that a retrial of the same evidence would be a waste of time since a successful re-prosecution below would only result in this court again re-weighing the same evidence again on appeal. However, the United States Supreme Court noted that:

Although reversal of a first conviction based on sharply conflicting testimony may serve the interests of justice, reversal of a second conviction based on the same evidence may not.

⁷ It is anticipated that Appellant will argue that the rationale in *Tibbs v. Florida*, 457 U.S. 31 (1982) is inapplicable to this case because the Florida Supreme Court based its reversal on a state rule that allows reversal and remand if the appellate court is convinced that the weight of the evidence does not support the verdict. *See Tibbs*, 457 U.S. at 36, n. 8. Although this court has never formally enunciated a similar rule, it is respectfully submitted that since the evidence was technically sufficient, this court has tacitly adopted a similar rule in this case.

Tibbs, 457 U.S. 43, n. 18. Here at a retrial, the defense will have an opportunity to remedy its gas chromatography expert's apparent lack of preparation at the first trial. As noted previously in Section IV(B)(1) of this Petition, Mr. Davis' testimony demonstrated that he was unaware of either Mr. Tontarski's sampling technique or his method of analysis. Consequently, the jury may well have discounted Mr. Davis' opinion since he did not appear to have an adequate factual background upon which to base his opinion. Conversely, upon becoming fully informed about Mr. Tontarski's technique, Mr. Davis may well agree with Mr. Tontarski's conclusion that the samples contained gasoline.

Moreover, at a new trial "[i]t is possible that new evidence . . . will make the State's case even stronger during a second trial than it was at the first." *Tibbs*, 457 U.S. 43, n. 19. This may be especially true in this case since new evidence has come to light that if credited by a jury, would make the State's case even stronger. This new evidence includes the following:

(1) A fellow inmate of Appellant's at Stillwater Prison has reported that Appellant confessed to setting a fire in a dwelling where children were present. See Affidavits and Statement reprinted in Petitioner's Confidential Appendix.⁸ According to this inmate, he and Appellant were sharing a marijuana cigarette and watching a news program about another arson case involving an arson of a dwelling with a child inside. In response to this news report, Appellant told the inmate: "I did the same thing." Although this inmate is currently in-

⁸ The name of this inmate is provided in the affidavits and statement contained in Petitioner's Confidential Appendix. To minimize the risk that other inmates may take retaliatory actions against this inmate, the State requests that this inmate's identity not be revealed to the public until a new trial is scheduled or until this court determines that the dictates of justice require an earlier release. A copy of Petitioner's Confidential Appendix, however, is being sent to Appellant's counsel.

carcerated, he has made no attempt to obtain any promises or deals from the prosecution in exchange for his cooperation. Also, no threats or promises were made by anyone to induce this inmate to provide this information. The only consideration given to this inmate is the promise that he will be transferred to a different Department of Corrections Facility so that his safety would not be in jeopardy from other inmates once it was revealed that he has provided the prosecution with evidence against Appellant. Because Appellant did not make this confession until April, 1985, it was not available as evidence at Appellant's initial trial.

(2) On August 16, 1985, a formal grievance complaint against defense expert Shelby Gallien was filed with the Ethical Practices and Grievance Committee of the International Arson Investigators, Inc. See Letter of John R. Lewis and Complaint reprinted at pp. 22-29 of Petitioner's Appendix. The complaint was based upon Mr. Gallien's alleged violations of ethical duties during his testimony at Appellant's trial. The complaint is still pending because the Ethical Practices and Grievance Committee has been unable to contact Mr. Gallien despite repeated attempts to do so. The defense's theory of accidental fire was premised primarily upon Mr. Gallien's expert opinion. In qualifying himself as an expert at trial, Mr. Gallien testified that he was a member of the International Association of Arson Investigators. At a retrial, evidence of this ethical grievance would serve to impeach both Mr. Gallien's credentials as an expert and his expert opinions.

It should be noted that the State is not requesting this court to reinstate the convictions as a result of this new evidence nor is it basing its request for a new trial on the ground that

it now has sufficient evidence to convict Appellant. The State's position is that the evidence at trial was technically sufficient to sustain the convictions. See Section IV of Petition. This new evidence is noted solely for the purpose of showing the court that if a jury credits this new evidence at a retrial and Appellant is again convicted, the evidence on appeal from a second successful prosecution may well resolve any doubts this court now has about the weight of the evidence.

B. Rehearing of this Case on Appeal is Permissible under the Double Jeopardy Clause.

In Appellant's Objection to Motion to Enlarge Time to File Petition for Rehearing, Appellant claims that because the decision stated that the evidence was insufficient, a rehearing of this case violates the Double Jeopardy Clause. Although under *Burks v. United States*, 437 U.S. 1 (1978), an appellate decision holding that as a matter of law that the evidence is insufficient bars retrial, double jeopardy does not bar further appellate proceedings in a case if the applicable rules allow for such proceedings. In this case, both Minn.R.Civ.App.P. 136.02 and 140.03 provide that the filing of a Petition for Rehearing stays the entering of judgment in this case until disposition of the petition.

Appellant's reliance upon *State v. Abraham*, 335 N.W.2d 745 (Minn. 1983) is inapplicable to this proceeding since, in reversing the convictions of this case, this court acted as a reviewing tribunal and not as the trier of fact. Although an acquittal by either the jury or a trial court judge cannot be appealed, an appellate court's finding of insufficiency is still subject to further appellate review. See e.g. *Tibbs*, 457 U.S. at 47 (Florida Supreme Court's reversal indicating sufficiency as reversal grounds did not bar reconsideration of this decision in a separate appellate proceeding).

VI. CONCLUSION

Consideration of the material evidence that was overlooked or misconceived demonstrates that the evidence of guilt was sufficient as a matter of law. Thus, this court's reversal was based upon a re-weighing of the evidence rather than a finding of sufficiency.

Therefore, the State respectfully requests that its Petition for Rehearing be granted and that this court either reinstate the jury's verdicts finding Appellant guilty of eight counts of Murder in the First Degree or remand the case for a new trial in the interests of justice.

Dated: April 10, 1986.

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APPENDIX J

Transcript Excerpts of Ward Mahlen's Testimony

[T.373] Mahlen—Direct

* * * has been overhauled and cleaned out.

Q. Dining room or living room?

A. Oh, I am sorry. I beg your pardon. The living room, and, once again, it shows a hole in the floor where we cut out a floor sample.

Q. And 9D, what does that show?

A. 9D is a closeup of some debris on the floor, which is the area of the sofa directly—which was located directly below the—if I have my directions right—south window of the living room.

Q. This sofa here (indicating)?

A. That's correct.

Q. Which is located here (indicating)?

A. That is correct.

Q. Where, in relationship to that sofa, was that piece of wood cut out of the floor?

A. Approximately 8 feet north of the sofa—north of the wall, so 3 or 4 feet in front of the sofa.

Q. Why did you cut that piece of wood out of there?

A. After we cleaned the floor, we saw unusual burn patterns on the floor. Patterns which we couldn't explain naturally through any other accidental or natural burn process. The burn patterns were, had burned through the carpet, through three-quarter-inch sheet of particle board, and down into the plywood [T.374] subfloor and had formed a trail all of the way through the living room area.

Once again, we selected the area of the burned pattern that we felt was—gave us the best area that might have been

protected and may get the best chance to get a good sample.

Q. Did you take some pictures of those burn areas in the floor you described?

A. Yes, I did.

Q. Did you have them blown up?

A. Yes, I did.

Q. Would you take a look at what is marked here as State's Exhibits 15 and 16, they are a little bit out of order in relationship to the others. But, can you tell me if you recognize those photos and what they are—not what they are—and whether or not they are good shots?

A. Yes, they are accurate photographs of the scene.

MR. BYRNE: I am going to offer into evidence the State's Exhibits 15 and 16.

MR. CASCARANO: I have no objection.

THE COURT: There being no objection, State's 15 and 16 are received.

BY MR. BYRNE:

Q. I wonder if you will take a look at 15, Deputy, and [T.375] tell us what that is a picture of?

A. This is a picture of the deep scarring on the floor showing a very distinct pattern or trail where, I believe, accelerant had been poured. This is consistent with other—with my experiences where I see—

MR. CASCARANO: Can we approach the Bench?

THE COURT: Yes, come along.

(Conversation at the Bench, not recorded.)

THE COURT: Thank you, gentlemen.

BY MR. BYRNE:

Q. It is scarring and rutting in the floor, right?

A. Yes, it is. It also took place in the center of the floor.

Q. I want you to just for a moment stick with me and my question and then we will show the crowd where they were.

Why don't you take a look at Exhibit 16; tell us what that shows?

A. There is a little wider angle of the same area showing scarring or rutting through the particle board in the floor.

Q. Are they two different locations?

A. Yes, I believe they are.

Q. Could you then, with whatever index you have or record [T.376] of where the photographs came from, step to the model and with the pointer show the jury where each of the patterns was?

First of all we will refer to State's Exhibit 15.

A. Okay. Maybe on this area here—

Q. Well, yes.

A. Okay. We found two trails that went—one went this direction; another went down this direction; and the third connected the two. This area here (indicating).

Q. Fifteen?

A. Fifteen is an area of a burned trail. It was approximately in this area here in front of where these chairs would be.

THE COURT: For the record, would you describe what area it is that you are pointing out on the diagram?

THE WITNESS: Okay. That would be approximately 3 or 4 feet from the south common wall in the living room, in the approximate center of the room from east to west, 3 or 4 feet out. It ran east to west in the approximate center area of the room.

BY MR. BYRNE:

Q. Then could you tell us where the rutting or scarring that was visible in State's Exhibit 16 is located?

Again referring to State's Exhibit 4, the [T.377] overhead photograph.

A. This photograph shows the rutting. This would be the south end of the living room or—I beg your pardon, the west end of the living room going toward the east end; would start approximately in this area here and run almost all of the way down to the hallway. We can also see another area coming off here. This area was approximately—this area which connected the two scars.

This would be a linear scarring running from east to west on the north side of the living room.

Q. Extending off toward the dining room, is that correct?

A. Extending over to the dining room.

Q. I wonder if you would like to take your seat.

MR. BYRNE: Your Honor, I would like to offer these photographs to the jury at this time?

THE COURT: All right, you may do that.

MR. BYRNE: Does the Court wish to see these?

BY MR. BYRNE:

Q. Now, I want you to take a look at 10A through 10F. Tell me if you recognize those photos and if they are good pictures of what they show?

A. Yes. These areaphotos of the living room and ceiling. And they are accurate photos.

MR. BYRNE: I offer them into evidence.

* * *

[T.387] * * * significance with the jury.

Referring first to 11F.

A. This is a photograph of the northwest corner of the kitchen, showing the kitchen table and the floor area. We will be able to see it better when this area is cleaned out. Before we cleaned it out, you could still see we had a fire back at the area of the table here. This white area is the hot area. That is where the fire burned the hottest.

Q. Referring to the V pattern, you mean?

A. Well, you see a V pattern starting down in the corner and it goes up on either side of the wall. Once the fire started there, it sought oxygen, and the fire, of course, burned towards each window.

Q. This is obviously before cleanup, is that so?

A. That is right.

Q. And would you point to what corner that is on the map and also on the photograph?

A. It would be the northeast corner directly inside the kitchen area right back in here (indicating).

Q. Now, showing you State Exhibit 11H. Could you explain that to the jury, please?

A. This is a photograph of the top of the kitchen table; kitchen table was placed up against the east window, to the east window sill here. And, what is important [T.388] here is that we see a burned pattern right on top of the kitchen table, which we looked at later. We turned the kitchen table, and we found we were able to demonstrate this burned that took place from the top of the table, burned from the top down. And, as I say, fire burns in a predictable manner. It burns up.

So this is significant because the only way—

MR. CASCARANO: Your Honor, I am sorry, I will object again to any conclusions. Just simply describe what he sees in the picture.

THE COURT: Sustained.

MR. BYRNE: May we approach the bench, Your Honor?

THE COURT: Yes, come on.

(Conversation at the Bench, not recorded.)

THE COURT: You may proceed.

MR. CASCARANO: Your Honor, the record should reflect that there is a continuing objection during the testimony of

App. J6

Mr. Mahlan. The objection is the Defense feels that Mr. Mahlan should be able to testify only to what he sees in the picture and not draw any conclusions from that.

THE COURT: The Court has ruled that in allowing Mr. Mahlan to testify as to the predictable [T.389] way a fire burns, that that is not the same as allowing him to testify as to the conclusion that there was an accelerant. So the Court is overruling Mr. Cascarano's objection.

MR. CASCARANO: Thank you.

MR. BYRNE: The objection is overruled?

THE COURT: Yes, the objection is overruled.

BY MR. BYRNE:

Q. Mr. Mahlan, you can continue explaining why it is significant to you as an investigator, an arson investigator, particularly, that this—that it was burning on the lower edge of the tabletop.

A. Okay. We determined that the fire burned from the top of the table down through the table which is an unnatural way for a fire to burn. It is consistent with the flammable liquid type of burn where something sat there and burned, and eventually burned itself down through the table.

Q. We were able to further document that by turning the table over and noting there was no other burn on the bottom of the table. So we were able to determine that it burned from the top down.

Q. Does the table show an opening through which that burn might well have burned?

A. Yes, it does. As a matter of fact, there was two [T.390] areas right in the center where the two leaves of the table met, which is this area here and one other area independent of that.

App. J7

Q. Showing you State's Exhibit 11I, would you explain the significance of that photograph to the jury, please?

A. Okay. We turned the table over, and, as you can see, the—there is virtually no burning that took place on the table. All of the metal areas are intact and this particle-board bottom is intact. The only burning we see is the area between the two sections of the table and one area over here which burned from the top down.

The top of the table had a wide scar, and when we looked on the bottom, it is much narrower, indicating the fire burning downward at this point.

Q. I am asking then for you to explain 11E?

A. Okay. This is the same point we saw before, after cleanup. We moved the table and much of the debris, swept the floor out and it is much easier to see a V pattern. Once again, in the corner of the room, which is normally a dead-air space, we see a fire originating right down in the corner. The baseboard is burned right through, and we can see the corner of the V heading off this direction and actually up into this area right here, indicating that there was an [T.391] unnatural reason for that fire to burn from the corner. It started down at the corner and burned up.

Q. Looking at 11K, can you tell me if I am holding it correctly?

A. That is right.

Q. Would you explain that photograph, please?

A. If we took the table and moved it out of the way and walked right up to the windowsill and looked straight down, that is what we would see. This is the sill on the window and we see a significant burn only in one area, even the paint isn't blistered in the rest of the windowsill. This area was—here, was protected because heat rises and the window wasn't out

App. J8

all of the—heat went up to the top of the window. This bottom part of the window is fairly level with the top of the table, indicating a burned—with a very sharp line of good wood and bad wood, indicating—or it would be consistent with a flammable liquid sitting only in that area or being splashed only in that area and burned.

Q. Did you take a sample in that location for analysis?

A. Yes, we did.

Q. And 11J, that is the same window with the same scarring?

A. Same window with same scarring; however this time we [T.392] are standing outside of the building and we are looking in toward the kitchen. Once again, you can see a very sharp line which is burned there, with no natural explanation for the burn to be confined only to that small area.

Q. Would you demonstrate on the model where this window is, please?

A. That window is right here (indicating). The table is directly up against the window. On the model, it would be this windowsill right here (indicating).

Q. I have a couple other questions about the grouping of State's Exhibit 11. I would like to have you explain to the jury the significance of 11C.

A. Okay. This photograph is like this, this is a photograph of the kitchen—well, through the center of the kitchen, taken from the doorway of the dining room, standing in the dining room looking towards this window that we just saw the scarring. And you can see it right here in the photograph and we are looking down the floorway toward the window.

The significance here is the blistering and scarring of the floor all of the way from the edge of the floor way to the dining room and into the kitchen. The entire area here exhibits a blistering of the tile.

App. J9

[T.393] Q. Would you explain to us what the floor covering in the entrance and the kitchen was?

A. It was a single linoleum or vinyl tiles. I don't remember exactly what the composition was, approximately 12 inches square that were placed on the floor.

Q. From the front entrance down into the kitchen?

A. From the front entrance throughout the kitchen, and also the hallway leading from the living room, from the entrance—the foyer area and the kitchen and actually, I guess, the area in front of the bathroom as well.

Q. And 11B, is that a closeup of that same bubbling effect on the tile?

A. Yes, it is. If we move approximately halfway through the kitchen from the first picture, we would look down and we would see how distinct and sharp the charring or bubbling on the floor is. If you look between the good and bad tile, you'd see that the good tile is—has virtually no flame damage to it at all. Only those very defined, black areas through the center of the tile exhibit any burning at all.

Q. In your experience—I am sorry.

In your experience as an arson investigator, are you able to tell us whether that bubbling and scarring is consistent also with the presence of a flammable [T.394] liquid?

A. Yes, it is. There is no other explanation, no explained reason for that to occur in an accidental or natural fire.

Q. I want you to take a look at what is marked as State's Exhibit 1.

Tell us, if you can, identify that?

A. Yes. This is a photograph of one of the upstairs bedrooms. It would be the southeast bedroom, I believe.

Q. Would you demonstrate with the model which bedroom that is?

A. This would be the northwest bedroom, this bedroom here and this bedroom up right in the corner (indicating).

Q. And who slept in there, who was found in there; do you know?

A. Two individuals were found in there.

Q. Michael and Corey?

A. I don't remember the names—Yeah.

MR. BYRNE: I offer State's Exhibit 12 into evidence?

MR. CASCARANO: Your Honor, for the record, we have had a chance to review those this morning in Chambers. We have no objection.

* * *

[T.397] THE COURT: State's 17A through D received.

BY MR. BYRNE:

Q. I want you to discuss with the jury the significance of 17A.

A. It is a photograph of the stairway that leads from the living-room area up about 7 or 8 steps to a landing. One would turn around and walk the rest of the way up to the second floor. The stairway heads exhibited great amounts of fire damage, see the rolling blisters.

And another thing that was significant with this, is that the damage was almost uniform throughout all of the steps, which we normally don't find if the fire is simply drawn up the stairway seeking oxygen. It was evenly burned, and even though the—what is that part called—the risers, behind the stair tread, it was burned through in several spots, which indicate that the fire sat on the steps and burned for a long, hot period of time.

Q. Does that stairway show some of that alligatoring effect that you discussed earlier?

A. Yes, it does. See the shiny, heavy, rolling blisters on the stair treads as well as the handrail and other wood members.

Q. I want you then to explain the significance of 17B.

[T.398] A. Okay. If we were to go down to the basement from the living room, to directly behind this set of stairs going to the second floor, there is another set of stairs that go down to the basement. So as we start down the basement, behind this set of stairs that we just saw in the earlier pictures, there was virtually no fire damage down in the basement. So the back of the stairs was covered with a piece of sheetrock or plasterboard; we peeled that sheetrock off.

What we observed was a heavy amount of burning on the back of the structural members. This is not the back of a step here; this is a joist. And we see a lot of burning down here in the joist itself, area, which is completely unexplained, because that entire area was—throughout the fire, was completely enclosed with sheetrock on one side and the joists on the other side, with the tread on top.

But, nevertheless, we see a large amount of burning on that area, unnatural, can't be explained in any natural way.

Q. This was the underside of the stairwell that went from the ground floor up to the second floor?

A. That's correct.

Q. Is that consistent with something present drawing the [T.399] fire down instead of burning up in its natural form?

A. About the only way we can explain is a flammable liquid seeped through the carpet and between the treads and the risers and flowed down the backside of the structural members, heating the joists.

App. J12

And, when it reached high enough temperature, it also began to burn. There could be no other reason for us to find fire back there.

Q. There was no fire below it burning up into it?

A. No.

Q. Do State's Exhibits 17C and D—or do they, I should ask, demonstrate that same burning under the stairs?

A. Yes, they do.

Q. I am holding D correctly?

A. Yes. This dark area right down here is the basement, going down into the basement. That is that structural member joist and we can see the very sharp line without any difficulty. We can see exactly where the flammable liquid flowed and sat and burned. We see this going, some heavy charring, and we know it sat and burned for a significant amount of time because we can see approximately half of this two-by-four is burned through.

Q. Does 12C—or 17C, excuse me, demonstrate essentially
* * *

* * *

[T.403] * * * those samples taken from the house?

A. Yes, we did.

Q. And those records were available to you?

A. Yes.

Q. And also of those records, did you prepare some materials to help demonstrate the location of those samples?

A. Yes, I did.

(State's Exhibit 18 and 19 were marked for identification.)

BY MR. BYRNE:

Q. Perhaps it would be easier if you were to step down here and take a look at, first of all, State's Exhibit 18 and tell me if you can identify this, and if it is accurate?

A. Yes, that is a diagram that we prepared and indicated several things on the diagram.

Q. And then looking at 19, can you tell us what that is?

A. That is a diagram of the second floor. This is the first floor, same thing, indicating different things found at the scene.

Q. Would you tell us what categories of things are represented on these diagrams?

A. The red areas represent the areas of initial-burn patterns.

[T.404] MR. CASCARANO: Can we approach the Bench?

THE COURT: Surely, come along.

(The following conversation at the Bench was recorded:)

MR. BYRNE: I would offer State's Exhibit 18 and 19 into evidence?

MR. CASCARANO: Your Honor, the Defense would object to the introduction of those diagrams as being cumulative. We have already seen the photographs which explain the same things, that is the case of both photographs where the bodies are found. Again, that is—well, cumulative. I don't see any purpose. I am also afraid by the diagrams of the bodies that may draw some improper inferences.

I expect Dan will introduce the pictures to show the location of the bodies—that has been already introduced—tentatively introduced by the picture.

MR. BYRNE: The two diagrams have three levels of representation. The first is the location of the suspicious areas each—on each floor, showing the overall pictures of the suspicious areas as opposed to the individual photographs.

The second level is the location from which the samples were taken. There has been no designation where all of the samples came from until now.

[T.405] The third level is the—indicates where the bodies were located. And of interest of those five samples that were found to contain gasoline.

It assists the State in demonstrating the scope of the suspicious—scope of the investigation and in pinpointing with more precision the locations that are relevant to that.

THE COURT: So the reasons just set forth by Mr. Byrne on the record, the Court is determining that this is not cumulative. It is probative, and it is proper to be put before the jury. The objection is overruled.

I want to be sure, Mr. Byrne, that we continue to be aware of the kind of testimony that this witness is giving. I want to be sure that I understand whether or not you intend to have him testify specifically that gasoline—

MR. BYRNE: No, I don't.

THE COURT: Okay. I want to be sure that this testimony is consistent with a flammable liquid.

MR. BYRNE: That is all the farther he has gone.

MR. CASCARANO: The same admonition also applies to the victims upstairs. I don't know if he is going to say anything except—about the location [T.406] of the Teddy bear or anything like that?

MR. BYRNE: No, he is not going to say, no.

THE COURT: That is correct, fine.

MR. BYRNE: I didn't talk to him specifically about that.

MR. CASCARANO: And the protection, the one laying on top of the other, that is as far as we can go?

MR. BYRNE: Partially on top of the other.

THE COURT: Okay. No other considerations.

(That ends the conversation held at the Bench, recorded and out of the hearing of the jury.)

THE COURT: The objection is overruled. State's 18 and 19 are received.

I think it might be helpful for the record just to indicate again exactly what 18 and 19 depict.

BY MR. BYRNE:

- Q. State Exhibit 18, Officer, is what level of the house?
- A. That would be the ground or first floor.
- Q. And State's Exhibit 19 would be?
- A. Second level.

THE COURT: All right. Thank you. And you may proceed.

BY MR. BYRNE:

Q. Officer, I am going to put State's Exhibit 18 on the [T.407] easel and I want you to tell us what appears on the first level, information on 18, if you will tell the jury.

A. Okay. The first level, the red marks represent the unusual burn patterns or, rutting, scarring of the floor and fire starts that we were able to document. For instance, we were able to document that a fire here, here, this corner, this corner, et cetera, and these lines running through these rooms represent scarring and rutting, blistering on the floor that we observed.

Q. Once you made those observations and—Did you take some samples from that level of the house?

A. Yes, we did.

Q. And do they appear, the location of those samples appear on the second—Can you, referring to whatever notes or information you need to tell us, can you tell us what samples were taken from the first level and describe them, please?

A. In the green lettering I've written numbers and letters; they correspond to the sample numbers that I took from the residence. Start up here, A16 was a sample of a liquid floating on the water that was placed in the house by the firefighters.

App. J16

They took a sample of the sludge floating, sludge floating on the [T.408] water near the refrigerator.

A8 was a sample taken from the floor where we observed the heaviest amount of blistering and scarring under the kitchen table in the corner of the kitchen.

A-11 was the windowsill, was cut out of the window, secured.

B38 was a sample of the moulding in the corner of this room that had been charred by fire. This is the entryway, and directly inside the entryway we saw the V pattern and the low moulding was burned.

B39 was a section of the floor that was cut right out of the floor in the entryway.

A18 was another sample of the tile, blistered area of the floor.

C2, C3, C4, C1 were items that were found where we dug through the closet there. They included a can of Holiday lighter fluid, a charcoal lighter fluid, and a partially-burned jacket, and samples of sludge on the floor.

A18 was another sample of the debris on the floor.

C5 and C6 were samples of the treads where we took a saw and literally cut sections of the treads on the stairway.

[T.409] B4 is a sample cut out of the floor, one of the areas where we saw of the heaviest rutting in the living room.

A10 was a sample of carpet. That is only one piece of carpeting we found in the entire house that hadn't been burned. It was a section of carpet approximately 8 or 10 inches in diameter. It was circular. And, we also found a metal tray approximately that size.

What had happened is the tray had been placed on the carpet and protected the carpet from burning, because no oxygen was able to get through the carpet in that area. So this represents the debris and the carpeting in that area.

A9 was a sample taken of the debris in that area.

Q. In looking at the third level, what does that demonstrate?

A. The third level represents, written in black, represents the position and location on the first floor where Mrs. Berndt was found. Those other references here, A10, C6, B38, and A11 are written in black because they were significant to us with respect to the report that we received back from the laboratory.

Q. We now are showing the jury State's Exhibit 19, which, [T.410] of course, is the second floor. I wonder if you could tell us what is on the first level of that, or first layer.

A. Okay. These red marks, once again, indicate heavy areas of char and unexplained fire locations in the rooms. There were—There was much heavy charring and many other areas of fire damage, but these only represent the areas we are certain could not have occurred naturally, had to be a result of something foreign.

Q. And the second level then?

A. Second level represents locations of samples that we took; B37, which was a section of the floor cut out of this boys' bedroom. And, B11 was a sample taken in the closet of the Master bedroom.

Q. That first one you referred to is—There were just two taken from the second level?

A. That's right.

Q. Of the wood and flammable samples?

A. Right.

Q. Then the last level?

A. Okay. The last level, once again, the black outlines represent the approximate location of the victims found in this bedroom and the one boy found in this bedroom. Once

again, the black sample numbers here [T.411] correspond to significant interest to us with respect to the evidence that was submitted.

Q. Did you also, Deputy Mahlan, take out—I think you have told us a number of electrical outlets and switches? Do you know how many you took? Precisely, if you know; approximately, if you don't.

A. I have a list here, but, approximately 30 switches and outlets.

(State's Exhibits 20, 21, 22, 23, 24, and 25 were marked for identification.)

BY MR. BYRNE:

Q. Will you take a look at, first of all, State's Exhibit 20. Tell us, if you can, identify that?

A. Okay. This is the sample of the—Do you want me to show it on the—

Q. Well, perhaps you can identify it by location?

A. Okay. This would be—

Q. And if you need the pointer on the model?

A. This can contains a portion of the stairway tread which I removed from the second stairway, second tread, going up to the second level from the living room.

MR. CASCARANO: Your Honor, may we approach the Bench for a moment?

THE COURT: Come along.

MR. CASCARANO: Your Honor, we would object * * *

* * *

[T.422] * * * It will come up with a clean, nice, shiny copper.

If it has gone through an electrical malfunction or extreme high heat, this copper can change color and it will be more of a maroon color than a copper color.

So we examined everything for those types of indications that might lead us to believe that an electrical malfunction had taken place.

Q. Did you find any indication of an electrical malfunction?

A. No, we did not.

Q. None whatsoever?

A. None whatsoever.

MR. BYRNE: Thank you, Deputy. I have nothing further.

THE COURT: Thank you.

Members of the jury, I have reconsidered about the break. I think we will take a very short one, approximately five minutes, and reconvene.

(Short recess taken.)

(In the Courtroom in the presence of the jury.)

THE COURT: Mr. Cascarano, you may inquire.

MR. CASCARANO: I have had a chance to speak with Mr. Byrne. I believe he has a few more questions.

THE COURT: All right. You may inquire, Mr. [T.423] Byrne.

BY MR. BYRNE:

Q. You saw no indication of any electrical malfunction. Did you see any indication of an accidental cause to that fire?

A. No. I don't see how it could have started accidentally, no.

Q. Any indication of any—This is repetitious—cause of that fire?

A. No. I see no way that the fire could have started and burned in any natural or accidental manner.

MR. BYRNE: Thank you, Deputy, I have nothing further.

THE COURT: Mr. Cascarano?

MR. CASCARANO: Thank you, Your Honor.

CROSS-EXAMINATION
BY MR. CASCARANO:

Q. Mr. Mahlan, you are qualified as a technician for the Sheriff's Department?

A. That's correct.

Q. You do a number of things as a technician?

A. Yes, I do.

Q. You went to school to learn about fingerprints, general things, is what I am trying to say, I guess?

A. That's correct. The same things that all of us do.

App. K1

APPENDIX K

Transcript Excerpts of Fire Marshal Jerry Pedlar's Testimony
[T.717] Jerry Pedlar—Direct

A. Yes.

Q. In your experience both as a trainee in arson and then as an investigator in arson and in conducting the drills that you have described, have you learned something about the properties and characteristics of gasoline and inflammability?

A. Yes, I have.

Q. What could you tell us you learned about gasoline in those drills?

A. That it's highly volatile; that in the use of gasoline in a given area, that once ignition has been made of the area, that you get an automatic ignition of the fumes throughout the entire area.

Q. Does gasoline itself burn or is it the fumes that burn?

A. The fumes and the liquid will burn. The fire will communicate by the vapors.

Q. In your experience, have you seen where it is that a fire has started in an enclosed area where there are a lot of gas fumes?

A. (No response.)

Q. Do you understand that question?

A. No. Would you rephrase it, please.

Q. Have you seen an enclosed area full of fumes ignite?

A. Yes, I have.

Q. Could you describe how those fumes ignite or how the [T 718] flames spread in the ignition in a room full of gasoline fumes?

A. In the examples that we used during our house burnings, we poured gasoline into, for example, a basement area,

App. K2

ignited it with a burning object, and there was automatic rapid ignition. The entire area just went "whoom" in flame.

Q. Would you sometimes hear a noise when it flamed up?

A. You would at times, yes.

Q. When you heard a noise, did how loud the noise was depend on the amount of gasoline or, rather, how long the fumes had had a chance to collect?

A. I would say that would probably depend, at least in my experience, on the length of time that the gasoline was there and the fumes were able to spread.

Q. The longer the fumes had to spread, the greater or the more instantaneous the combustion?

A. No, I can't say that that is true.

Q. The louder the noise?

A. At times. Again, it depends on the geographical area you're using.

Q. Could you explain that, please?

A. If it's in a confined area, at the time of ignition you may get the breakage of glass, for example, and the sudden energy of the ignition coming out through * * *

* * *

[T.768] (Thursday, October 27, 1983, Afternoon Session)

GERALD PEDLAR,

resumed the stand herein and, having previously been duly sworn, was examined and testified further as follows:

DIRECT-EXAMINATION (Continued)

BY MR. BYRNE:

Q. I believe before you showed us the tape, you told us you had checked the fuse and control boxes in the basement and also two appliances down there, a washer and a dryer; is that correct?

A. Yes.

App. K3

Q. I don't know whether I asked you at that time whether you also checked the electrical appliances in the kitchen. If I didn't, I'm going to ask you now.

A. Yes, I did.

Q. What did you do to check those appliances?

A. We checked the dishwasher to see if it was in the on position, we checked the stove to see if any of the dials were in the on position, and we checked the refrigerator.

Q. Did you check beyond examining the controls to determine whether any one of those three items was the cause of the fire?

A. We checked behind the stove to see if there was any [T.769] indication of heavy burn.

Q. What did you find?

A. There was no indication of heavy burn behind the stove.

Q. How about the other two appliances?

A. As I recall, the dishwasher was a builtin. We were unable to get behind that. The refrigerator had a heavy concentration of soot and smoke buildup. We found nothing mechanically wrong, although the refrigerator itself was highly consumed by the heat.

Q. In your examination of these three appliances, did you have reason to believe that they may have been the cause of the fire, one or all three of them?

A. No.

Q. In addition to looking at the appliances, did you also then look at the electrical outlets and sockets and such?

A. Yes, we did.

Q. All of them?

A. Yes.

Q. How did you do that?

App. K4

A. As we were going through each and every room, we took the electrical plug or receptacle out.

Q. And examined each?

A. Yes.

Q. I guess we can assume that that which had been exposed [T.770] to the fire was affected by the fire?

A. As I recall, on the outer plates of the plugs, there was some indication of heat.

Q. Did you examine the entire outlet in each case and the wires leading to it?

A. Yes.

Q. What were you looking for?

A. For any discoloration or any beading of the wire which would indicate a short or an arcing.

Q. What would be the significance of any beading or arcing?

A. If there was beading or arcing, that would indicate the possibility of an electrical fire.

Q. And did you find any beading or arcing?

A. No.

Q. In any of them?

A. No.

Q. Did you find any evidence at all in any of those outlets that they may have been the cause of the fire?

A. No.

Q. Did you look at the wire back inside the wall at some distance away from the outlet on these appliances? Not the appliance but the outlets.

A. We were able to look at the conduit or the tubing in which the wire went through in some given areas, but we did not look through all of the wiring inside the [T.771] walls.

Q. Was there any need to?

A. No.

Q. And why so?

A. There wasn't any indication that this was an electrical fire. We could find no beading of the wire, we could find no discoloration, we could find no heavy significant burn in any of the areas around the receptacle itself.

Q. Did you find any evidence of wall fires in the town-house?

A. There was some fire inside some of the walls, as shown in the videotapes, but there was no significant burn in the general vicinity of all of the receptacles.

Q. Did you find in your examination some glass that you found significant?

A. Yes.

Q. And was some of that glass taken into custody by yourself or others?

A. Yes, it was.

Q. Will you take a look at what has been received here as State's Exhibit 25 and tell us what is in there.

A. It's glass.

Q. Would you explain if there is any significance in that glass to you as an arson investigator?

A. There appears to be a heavy crazing in the glass.

* * *

[T.774] there were phonograph records. There were items that in a fire would have probably given off more heat than other items.

Q. Those items that were seized by you were then sent to Washington, at least the combustible ones?

A. Yes.

Q. You were in the building shortly after the fire was extinguished?

App. K6

A. Yes.

Q. Did you smell any gasoline?

A. No.

Q. Did you expect to?

A. No.

Q. Is a fire scene, even with gasoline present, such that the odor of gasoline may not be detected?

A. That's true.

Q. Do you know that from your experience in the test fires that you conducted?

A. Yes.

Q. You were with the defendant the morning some two hours after the fire, at the Brooklyn Center Fire Department?

A. Yes.

Q. Do you know what time it was when you were with him and had conversation?

A. Approximately 7:00 a.m.

* * *

[T.783] A. No.

MR. BYRNE: I would offer State's Exhibits 35, 36 and 37.

MR. CASCARANO: No objection.

THE COURT: State's Exhibits 35, 36 and 37 are received.

Q. (By Mr. Byrne) Mr. Pedlar, a couple more questions for you. Based on your experience as a firefighter, training as an arson investigator, your experience as an arson investigator, fire marshal, all of the information that you received as a result of this investigation, including a report from the laboratory in Washington, did you reach an opinion as to the cause of this fire?

A. Yes.

Q. And what is that opinion?

A. The fire was started as a result of flammable liquids.

App. K7

Q. As an arson investigator, would you call that arson?

A. Yes.

Q. Based on your experience as a firefighter, your training as an arson investigator, your experience as an arson investigator, the knowledge you have acquired about gasoline and fires, both in training and in your drills with Brooklyn Center, based on all the knowledge you have acquired in your investigation of this fire, in- [T.784] cluding the report from Mr. Tontarski that five of those samples contained gasoline, do you have an opinion as to whether a man sleeping on that couch could have escaped through that front door after that fire started as the defendant claimed?

A. Yes, I have an opinion.

Q. And what is that opinion?

A. That he could not have done it.

Q. Do you have an opinion as to what the result would have been to him had he been in there as he claimed when that fire started?

A. I believe that he would have been burned as a result of the fire.

Q. Do you believe he could not escape without injury?

A. Yes.

MR. BYRNE: I have nothing further.

THE COURT: Thank you, counsel.

Mr. Cascarano, you may inquire.

CROSS-EXAMINATION

BY MR. CASCARANO:

Q. Mr. Pedlar, you indicated to us that over a one-year period of time, Brooklyn Center has 600 fires; is that right?

A. No. We have 600 calls.

Q. I misunderstood. I thought you said 600 fires.

* * *

[T.794] Jerry Pedlar—Cross

A. Yes.

Q. Now, when you go out there, you can see from one townhouse down all the way down another. In other words, they call that area a common cockloft; is that correct?

A. Yes.

Q. No fire stops?

A. There were no fire stops.

Q. You indicated to us that in a gasoline fire there is, I think the word you used was automatic ignition of an entire area. That is true, is it not?

A. I beg your pardon?

Q. I apologize. In a gasoline fire, I thought I heard you to say that if there is ignition, there is automatic ignition of the entire area, all the vapors burn or go off.

A. Yes, I said that.

Q. That's true?

A. Yes.

Q. And that automatic ignition then, one would expect to hear an explosion; that is correct, is it not?

A. Not necessarily, no.

Q. That would depend, would it not, on the amount of gasoline used?

A. Possibly, yes.

Q. It would also depend on the amount of time that the

* * *

* * *

[T.810] Q. On the same tread, Mr. Pedlar, as a matter of fact, a tread just below C-6, you took a sample, C-5, low burn?

A. I don't recall without looking at the notes exactly where C-5 came from.

Q. Now, you gave us your opinion as to whether or not Skip could get out of here?

App. K9

A. Yes.

Q. That's based upon your experience and the fact that those black things there are gas?

A. Yes.

Q. I presume your opinion would be different if you found out that wasn't gas?

A. No, it would not be different.

Q. We talked about things that are of a suspicious nature that are not pure signs of arson: V-patterns, low burns, charring above, alligatoring, all of those things that we saw on your videotape on the pictures, those aren't sure signs of arson, are they?

A. They are unusual areas.

Q. I agree with that, but they aren't sure signs of arson?

A. No.

Q. There are some things in your experience as a fire investigator that are important, or perhaps sure signs of arson, one of which is if you smell gasoline on the arsonist. That is important, isn't it?

* * *

[T.847] Jerry Pedlar—Redirect

* * * in the floor was not that significant. Therefore, we didn't feel it necessary to take it from that area.

Q. And in this corner here in the living room, also no sample was taken. Why so?

A. Again, it's in the area of the television. There is some low burn on the moldings around the floor, but there were no significant burns in the top flooring.

Q. You told us also you didn't smell any gas at the scene. Were there other odors at the scene?

A. There were a number of odors. We could not depict what those odors were.

App. K10

Q. Is that common at fire scenes, where there is smoke, char, destruction of material?

A. You can pick up a number of odors at a fire scene such as this.

Q. You also said that you saw something floating on some water that you were interested in. What was your examination of that? What was a result?

A. We saw some discoloration floating in the water in the debris in the kitchen next to the refrigerator. We understand that that came back negative.

Q. Mr. Cascarano was also interested in the shingles and the drip-down potential there. Is there any way that shingles could have melted in the master bedroom or the other bedroom adjacent to it in the rear of the house * * *

* * *

[T.859] Jerry Pedlar—Recross

* * * this, right? You just told us that.

A. You can. Obviously, you can smell things.

Q. Not only smoke or soot but other things, right?

A. If you get close enough.

Q. No gas, right?

A. No smell of gas.

MR. CASCARANO: I have nothing further.

THE COURT: Thank you, counsel.

Mr. Byrne?

REDIRECT-EXAMINATION (Continued)

BY MR. BYRNE:

Q. How many gas fires did you build with the fire department in those exercises that you told us about?

A. Approximately 64 hours worth.

Q. And how many fires?

A. Sixty, 70, 80.

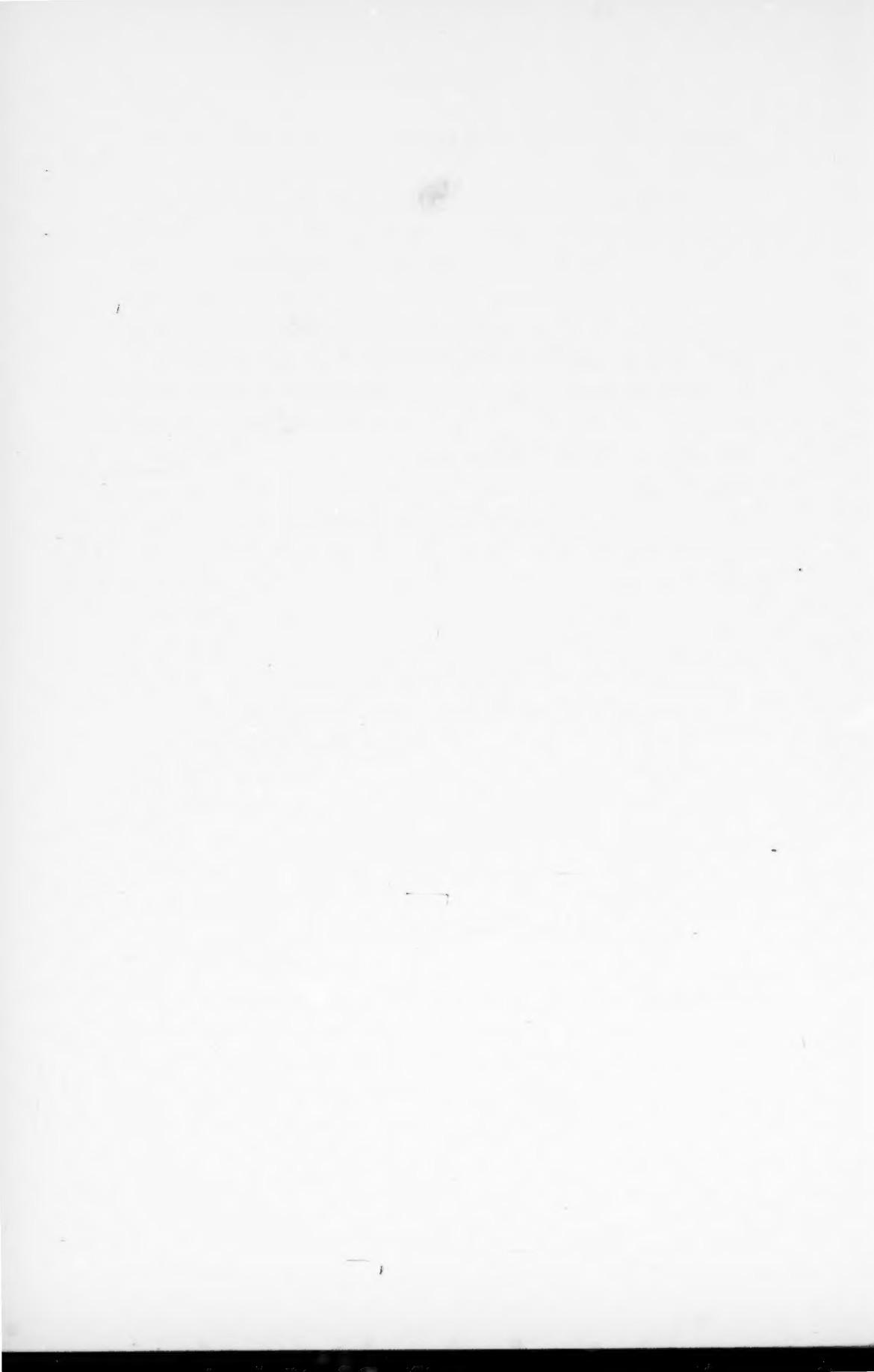
App. K11

Q. Did you smell gasoline when you went in after putting those fires out?

A. No. Due to the intenseness of the fire, the vapors and the fluid had burned off.

Q. Just a couple other questions. If you took a tile of the kind that was in this entryway and in the kitchen, as you did, placed it on a table, put a little gasoline on it and put a match on it, what would happen?

A. The gasoline is going to be consumed and the fire is
* * *



APPENDIX L

Transcript Excerpts of James Carlson's Testimony
[T.1070] Carlson—Direct

* * * high heat tend to burn just above the surface of the materials. Gasoline has—with going into too much chemistry—has what we call a flash point of minus 45 degrees. In other words, at 45 degrees below zero, we have vapors coming off of this material. So we always, under normal conditions, have vapors rising from gasoline. The vapors are heavier than air but they do rise.

On warm days at a gasoline station, you might be able to see these vapors coming out from your gasoline tank. The vapors tend to dissipate, they are over whatever amount of gasoline we have on the floor. They don't stay at one particular spot. They tend to rise and flow along the floor. If we could color these vapors, you might see a cloud traveling through the room. This cloud or vapors given off by gasoline is readily ignitable. And, when it meets a source of ignition, it ignites immediately.

The turbulence within this explosion or rapid ignition will, again, spread this gasoline. And, you have a fire that is exactly the opposite of a slow-burning progressive fire. We have one of very rapid ignition that happens within a fraction of a second, resulting in a fire. If we have this used as a trailer in a room, resulting in a fire that causes [T.1071] full involvement of the entire room rather than having the fire start from one spot, progress in a nice neat V pattern and go to the upper levels.

Q. You say "full involvement" of the room, instantaneously?

App. L2

A. Instantaneously. And that is based on my own experience when I was a firefighter and I have had to use this on occasion because everybody doesn't get a chance to work with gasoline. But, in the '60s, when I was on the Rescue Squad in Minneapolis and we did burn many homes on the north side for firefighting practice, it was our job to ignite these houses.

And, as a young firefighter, we had a wonderful time throwing gasoline into rooms. But, we did learn how gasoline reacted, how fast it ignited and the volume of fire that resulted from that.

Q. And from that, you would say how quickly a roomful of gasoline fumes would be involved?

A. A roomful of gasoline fumes, provided we had more than a thimble full of gasoline, we have to have an amount of gasoline. As vapors immediately form above this gasoline, and once it ignites, it has immediate ignition of the entire room.

Q. In examining a fire or the cause of a fire, had you had an occasion to examine fire caused by cigarettes left carelessly somewhere?

* * *

[T.1076] A. They did.

Q. Did you go to the scene of the fire—I should say—

A. No, I did not.

Q. You became involved sometime after the fire had been extinguished and cleaned up?

A. That's right.

Q. Saw a series of photographs?

A. I saw photographs and the videotape of the scene.

Q. And with your experience as a firefighter, arson investigator, and with the examination of the evidence available to you through their investigations, were you able to come to

a conclusion as to whether the Georgetown fire was caused by arson?

A. Yes, I was.

Q. And what was that opinion?

A. That it was an arson fire, that it was ignited by hand by the use of flammable liquid, gasoline.

Q. And based again on your experience as a firefighter and as an arson investigator, your examination of all of the evidence available in this fire, were you able to come to an opinion with reasonable certainty as to whether someone in the townhouse, in the back at the couch, rear window, when the fire started, could have escaped without injury to the front door?

A. Yes, I have that opinion.

[T.1077] Q. What is your opinion?

A. That under those circumstances, it would be impossible for a person to have been in the room at the time of the ignition of these vapors and escaped without being killed or at least harmed.

Q. Severely harmed?

A. Not that I am aware of.

Q. I say, severely harmed?

A. Yes, severely harmed.

Q. On what do you base that opinion specifically?

A. I base that on the witnesses' discovery of the fire, that is their first knowledge of the fire as indicated by noises that indicated rushing air sounds, whooshing sounds, sounds of things falling, crackling and their immediate observation of fire either reflected out the window or actual flames out the window.

Q. In the rear of the house?

A. Pardon?

Q. At the rear of the house?

A. At the rear of the house in the windows or apartment adjacent to the witnesses' apartment. This indicated that at the time of this first indication of noise and flame that that room was fully involved with fire. From that point on, these witnesses had to get their senses about them to see what in the world had happened.

[T.1078] The witnesses state that they, one of them got dressed; he felt the walls; he went down the stairway; he came out of the front; all of this time the full involvement—that entire room was fully involved with fire.

At their first observation of this had indicated full involvement of this room, and nobody is going to be in a room full of vapors and indicate that they slowly progressed from one point to another like a TV fire, where a person can run through these little fires within a room without being harmed.

Q. Were there other factors involved in your judgment?

A. Yes. Primarily the time element, the indications of full involvement, lots of flame reflections out the windows, and the full physical evidence of the gasoline.

Q. Did this fire, in your judgment, have any characteristics of an electrical fire?

A. None whatsoever. We have a room that is fully involved with vapors that must be ignited and there was no indication that any of the electrical service would ignite those vapors as it sat under those conditions. Nobody was doing anything. Nobody was cooking, operating motors. It was inconceivable that you would have a gasoline vapors as shown, gasoline [T.1079] spread throughout a dwelling and then have some type of electrical malfunction coincidentally.

Q. It didn't have any of the characteristics of a cigarette-caused fire?

A. Again, it was a very rapid fire as evidenced by the firefighters and the witnesses at the physical scene, rather than a slow-burning fire.

Q. Am I correct that the electrical fire would have been a slow-burning fire, too?

A. That is correct. It would have been either in an appliance or within a wall.

MR. BYRNE: Thank you, Mr. Carlson, I have nothing further.

THE COURT: All right. This is a good time to take our break for lunch.

Mr. Carlson, you may step down.

MR. CASCARANO: Your Honor, may we approach the Bench for a moment?

THE COURT: Yes.

(Short discussion held at the Bench, not recorded.)

THE COURT: We have reconsidered. Stay where you are. And, Mr. Cascarano, we will ask you to inquire.

MR. CASCARANO: Thank you, Your Honor.

* * *

[T.1089] Carlson—Cross

Q. You are aware that nobody smelled gasoline on Skip?

A. I am aware of that which is not unusual, yes.

Q. You indicated that you base your conclusion on the observations of the next-door neighbor, Charlie Catron and Linda Kauai; are you aware that Linda said she never went to her window and looked out; are you aware of that?

A. I am only aware that she did see through her window, from what advantage point, I don't know.

Q. Okay. You are aware, are you not, that you indicated that it is not possible for Skip to get out. That Mr. Catron got back in?

A. I was aware that he went in a few feet, yes.

Q. Few feet; who told you he got in there a few feet, Jerry Pedlar?

A. Other investigators; Jerry Pedlar was one.

Q. Mr. Pedlar told you he got in just a few feet, did he?

A. He got into the kitchen.

Q. Finally, you relied upon the reports of Mr. Tontarski, who indicated he saw the presence of gasoline in the graphs?

A. I haven't seen those reports, but I am aware of it.

Q. All right. Upstairs, are you aware that there were some charred patterns by the front door of the * * *

* * *

[T.1093] Carlson—Redirect

Q. All right. We will then move on to the next question.

What kinds of materials or what can cause that kind of rutting and scarring of the floor?

A. This is typical and consistent with the burning of flammable liquid, petroleum products, gasoline.

Q. Do you know of any other cause for that kind of burn pattern?

A. Only petroleum products which would burn hot enough and long enough at the floor level in this kind of a pattern. And, so the answer would be only petroleum products.

Q. Including gasoline?

A. Yes.

Q. Now, there was some discussion about—

MR. CASCARANO: Your Honor, may be approach the Bench?

THE COURT: Surely, come along.

(Conversation at the Bench, not recorded.)

BY MR. BYRNE:

Q. There was some discussion about how a cigarette might smolder on a synthetic rug to start a fire. In all of your ex-

perience, is it conceivable that the kind of fire we are talking about at the Georgetown Townhouse could have started by a smoldering cigarette lying on a synthetic rug?

[T.1094] A. No, I don't agree that it could start on a synthetic rug in the first place. But there is no similarity between this fire and the common cigarette-caused fire in relation to the time element, the amount of smoke that would come from a cigarette-based fire in a sofa or a chair. And, primarily those two aspects.

Q. Well, let's say that somebody was lying on a couch on the first floor in State's Exhibit 3, having fallen asleep while watching television and there was a cigarette smoldering in the carpet here. What would be the likely result of that person sleeping on that couch?

A. This is in relation to a cigarette on the carpet?

Q. Or in some other location where it starts a smoldering fire?

A. If it was in a piece of upholstered furniture smoldering for an extended period of time, there would be considerable smoke that would come from it. It would be evident on your glass and surfaces as far as smoke over this period of time, and, chances are, that a person involved would be asphyxiated from the smoke within an hour-and-a-half.

Q. It was suggested in a question to you that that fire could get started by cigarette smoldering in the wrong position for up to an hour-and-a-half, like from 1:30 [T.1095] to 3 a.m. in the morning.

Is it conceivable, in your mind, that cigarette smoldering for an hour-and-a-half, from 1:30 a.m. to 3 a.m., that at 3 a.m. this townhouse would have been, for all practical purposes, totally, that first and second floor, covered, filled with flames?

A. Not at all. You would have had a fire confined to that one area where it originated and, at the most, one room. If this were in an isolated farmhouse, it would be different, but we have people in the immediate area, adjacent, that would have smelled smoke very early.

Q. There were questions asked of you about the elimination of an electrical-caused fire.

In your review of this investigation and your knowledge of the evidence before you, do you consider the investigation made of the electrical possibility a complete investigation?

MR. CASCARANO: Your Honor, I'm going to object to that. It calls for a conclusion of this witness. This witness is disqualified in that he didn't conduct his own investigation.

THE COURT: Overruled.

A. May I answer? I would consider the investigation that the other investigators made relative to electrical [T.1096] cause, under these circumstances, to be totally sufficient.

BY MR. BYRNE:

Q. Incidentally, there was a discussion about the use of the term "trailers" and you said you didn't use that term.

What does the term "trailers" mean to you?

A. It means material used to communicate fire from one area, from the area of origin, to another. It is an arson, piece of arson equipment, I guess, you would call it.

Q. Would you consider, whether you use the term originally or not, those burned characteristics as "trailers"?

A. As I said, I don't—I didn't use that term, but I would consider that a trailer, yes. It communicates from one area to another by use of a flammable liquid.

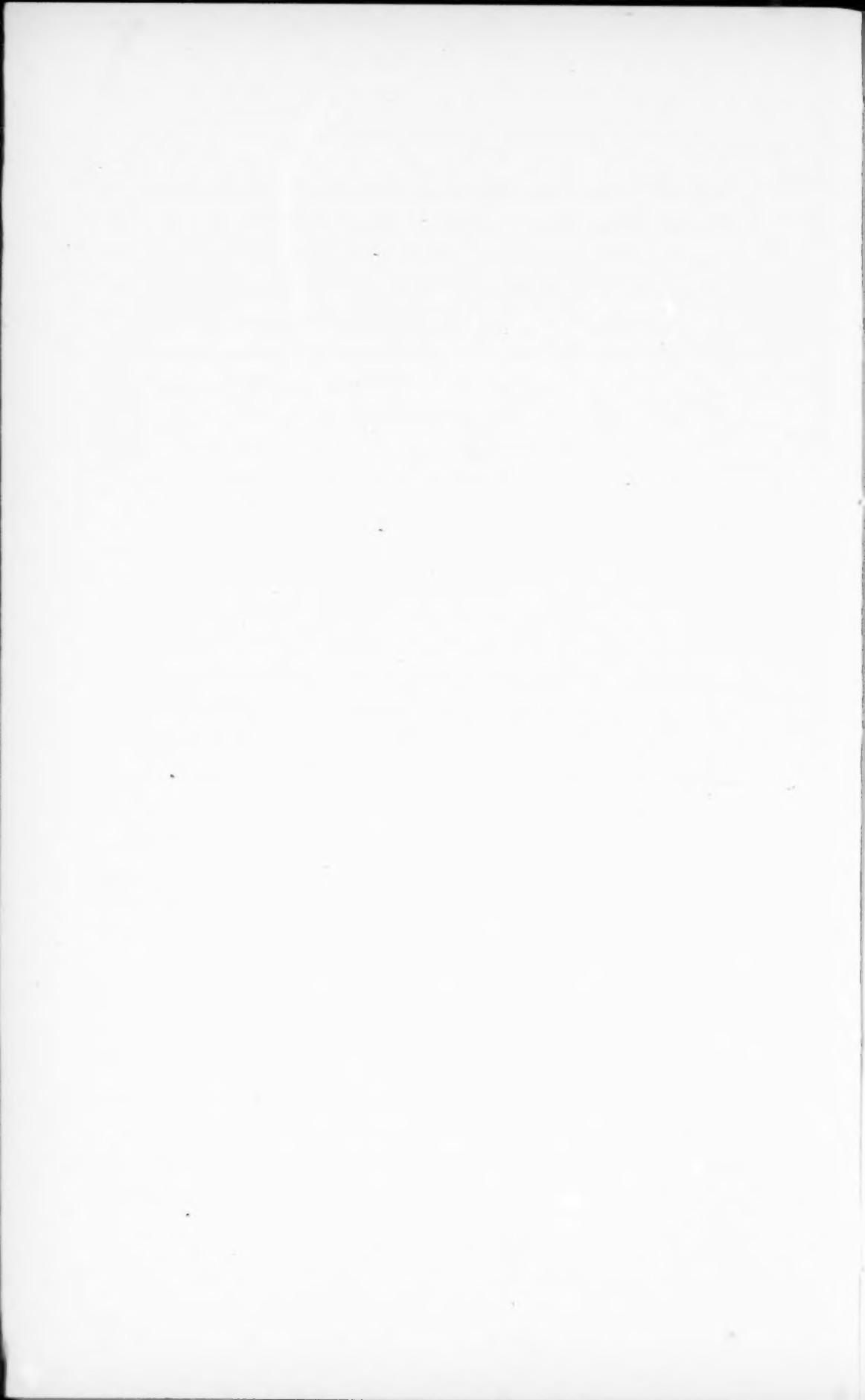
Q. The other question asked of you, I believe you conducted the information that the neighbors, none of them reporting hearing an explosion.

App. L9

Could you explain to us what sorts of sounds you might expect or would expect and have experienced in dealing with gasoline fires when a quantity of gasoline fumes ignited?

A. First of all, the term "explosion" means different * * *

* * *



App. M1

APPENDIX M

Transcript Excerpts of Sharadchandra Bhatt's Testimony

[T.927] Scharadchandra Bhatt—Direct

Q. Specifically, have you had some experience with and/or tested with gasoline?

A. Yes, I have.

Q. Could you describe that, please?

A. In addition to the observation of the damages produced by burning of gasoline, the one particular type of testing that I have done which can shed some light on certain aspects of the involvement of gasoline in a fire is regarding the rate at which gasoline fumes can be created from a certain amount of surface area. If there is a gasoline spill, the gasoline evaporates at a certain rate. And I have been able to measure, through the testing equipment that I have, as to how fast it will evaporate and the kinds of conditions it can create in a certain length of time.

Q. Were you asked by the authorities investigating the townhouse fire in Brooklyn Center which occurred in August of 1981 to analyze their investigation and make some—analyze their investigation, first of all, to review the investigation?

A. Yes, I was.

Q. And in doing so, were you provided reports of the investigation for your reading?

A. Yes, I was.

Q. Were you also given an opportunity to view some video-

* * *

* * *

[T.930] * * * have used to form one particular opinion.

Q. Based on your examination, based on your experience and training as an engineer and your experience as an engineer and investigator of fires, based on your understanding

App. M2

of the properties of gasoline, based on your experiments with and understanding of the evaporation of gasoline, have you reached an opinion with reasonable scientific certainty as to how much gasoline would have been present in the ground level of that house?

- A. I have not reached an opinion as to an exact amount, no.
- Q. Have you reached a reasonable estimate to a degree of scientific certainty that you feel comfortable with?

A. Yes, I have.

Q. And what is that estimate?

A. The estimate that I have reached is that a quantity of about five gallons of gasoline would have been ample to produce gasoline trails of the dimensions that have been described. What I am saying is, I'm not saying that no more than five gallons of gasoline could have been used. What I am saying is, five gallons of gasoline would have been an ample quantity, would have been sufficient.

- Q. Referring just to the first floor?
- A. Correct.
- Q. Now, did you go beyond that conclusion to analyze what the presence of five gallons of gasoline would do in that * * *

* * *

[T.934] * * * actual thickness of the area could be slightly higher, but half an inch is a good practical estimate.

It is also possible with the same amount of gasoline vapors to produce a comparatively lean mixture which will still burn or which will still flash, and that can be produced in the range of 1.4 percent of gasoline vapors by volume and the rest of it air. You can create a lean mixture like this. Of course, the layer would be thicker, on the order of two and three-quarters of an inch. But in one minute of evaporation, you can create an explosive mixture anywhere from half an inch thick to two and three-quarters of an inch thick.

App. M3

Q. In your experience with gasoline, and in your literature as well, could you explain to the jury what would happen if that vapor would be ignited in some location in the house at that time?

A. First of all, when these vapors are mixed with air to form this combustible mixture in the range that we have been talking about, it is capable of being ignited by a source of ignition. The temperature of the source of ignition typically is on the order of 800 degrees Fahrenheit, although for very low octane gasoline, the ignition temperatures are somewhat lower. When an ignition source like this is introduced, the gasoline ignites and a flame front then travels through the entire [T.935] mixture in a fashion somewhat similar to the flame front traveling from a spark plug in an automobile engine and then spreading throughout the cylinder. So from the point of ignition, the gasoline will start to burn, and this burning will spread very quickly throughout the combustible mixture of gasoline vapors and air. So in essence, there will be a flash that would ignite the collection of these vapors along the floor of that first floor. At that point, the heat that is being created by the flash will be picked up by the trails of gasoline, raising its temperature, and accelerating the process of the evaporation of the gasoline. At that point, it becomes a cyclical process, that the heat produced by the flash evaporates more gasoline, which tends to burn, and that tends to evaporate more of the fuel, and so burning like this will continue.

Q. Would there have been an instantaneous combustion of all those fumes, for all practical purposes?

A. For all practical purposes, yes.

Q. Would it have been possible for there to have been an isolated fire in that downstairs area for any significant amount of time?

App. M4

A. No, not under these circumstances.

Q. Mr. Bhatt, I now want to ask you if you are familiar with the characteristics of electrical fires.

* * *

[T.944] * * * of an occurrence.

Q. Is it possible to generalize as to the speed of the spread of an electrical fire? —

A. A purely electrical fire, yes.

Q. And what would that conclusion be?

A. The speed with which a purely electrical fire—and I would like to explain what I mean by a purely electrical fire. A purely electrical fire I would define as one that started at an electrical source of ignition and spread through the normal type of combustible materials that would be present, solid combustible materials that would be present, in a residential construction of the type that we are talking about. It would be controlled by the type of materials that were present in that construction. All I can say without knowing the precise type of materials is that it would be comparatively slow, and by that I mean I am comparing it with another type of combustible material as a hypothetical.

Q. The other type of combustible material being what?

A. The comparison I am making to the solid type of construction material is with combustible fumes, specifically of gasoline fumes.

Q. In your analysis of this fire, was its origin consistent with the presence of gasoline?

A. To the best of my knowledge, yes.

[T.945] Q. Was it consistent with an electrically started fire?

A. To the best of my knowledge, and with the evidence that has been made available to me, no.

App. M5

Q. Might there be one qualification on that; might an electrical something in the spark in one of the appliances have touched off the fumes of gasoline?

A. Yes. To put it technically, an electrolyte may have served as a source of ignition for the combustible fume and air mixture.

MR. BYRNE: Thank you, Mr. Bhatt. I have nothing further.

THE COURT: Thank you, counsel.

Mr. Cascarano?

CROSS-EXAMINATION

BY MR. CASCARANO:

Q. Mr. Bhatt, I just want to make sure I understand your role in this. You were contacted by somebody from the sheriff's office, presumably; right?

A. Yes.

Q. I'm sorry if I'm not making myself clear. The purpose of their contacting you was for you to attempt to determine how much liquid was placed on the first floor?

A. No, that is not accurate. Specifically, to the best of my knowledge, I was contacted by Mr. Robert Williams of ATF Division of the U.S. Treasury, I believe. And what * * *

* * *

[T.2193] SHARADCHANDRA NARBHESHANKER
BHATT,

recalled as a witness on behalf of the State in rebuttal, having previously been duly sworn, was examined and testified further as follows:

DIRECT-EXAMINATION

BY MR. BYRNE:

Q. Mr. Bhatt, I have just one question for you. It involves the photographs that have been received here in evidence as

App. M6

State's Exhibits 15 and 16. You will recall when you were here before that we discussed these briefly?

A. Yes, I do.

Q. And I believe I asked you the question at that time if these types of patterns in the floor were familiar to you.

A. Yes.

Q. And I asked, if you recall, if they could be caused by gasoline. Do you recall that?

A. Yes, I do.

Q. And your response was what?

A. Yes, as one possibility, yes.

Q. And are there any other possibilities?

A. Yes, there are.

Q. And what would they be?

A. The other possibilities are the burning of any type of combustible liquid, such as gasoline.

[T.2194] Q. Flammable liquid?

A. Yes.

MR. BYRNE: Thank you, sir. I have nothing further.

THE COURT: Mr. Cascarano?

CROSS-EXAMINATION

BY MR. CASCARANO:

Q. I apologize. I did not understand. You said the burning of any type of combustible liquid?

A. Yes.

Q. That doesn't have to be gasoline?

A. Correct.

MR. CASCARANO: Thank you, Mr. Bhatt.

(Witness excused.)

* * *

App. N1

APPENDIX N

Transcript Excerpts of Richard Tontarski's Testimony
[T.547] Tontarski—Direct

A. Yes, I did.

Q. Can you tell us what is in that exhibit?

A. A-11 contains wood which is—which has come from the kitchen windowsill.

Q. And after making your—or did you examine it in the manner you described which is gas chromatography technique?

A. Yes, I did.

Q. Having completed that examination, were you able to reach a conclusion as to the presence of any accelerant?

A. Yes, I did.

Q. What was it?

A. This particular item, or in this particular item, I detected gasoline.

Q. Was there any question in your mind that it was gasoline that you detected?

A. No.

Q. I wonder if you will open item A-11, please.

Are the items that you examined in there, still?

A. Yes, they are.

MR. BYRNE: I wonder, Your Honor, if I might just hold the can myself and pass it before the jury for their viewing?

THE COURT: You may.

MR. CASCARANO: Can I see?

[T.548] MR. BYRNE: You certainly can.

MR. CASCARANO: Thank you.

BY MR. BYRNE:

Q. Mr. Tontarski, I am handing you what has been received in evidence here as State's Exhibit 21. Will you take

App. N2

a look at that and tell us what that is and how you were able to identify it?

A. Again I am able to identify it based on the yellow tag that I have attached to the item as well as the identification evidence tape. The tape has a case number, exhibit number, date and initials. That is what was received as Item B-39 and also contains wood from the center of the entranceway is how it is labeled.

Q. Did you run the same tests on that sample?

A. Yes, I did.

Q. Were you able to draw a conclusion as to the presence of an accelerant?

A. Yes, I was.

Q. What was that?

A. I also detected gasoline in this item.

Q. Any doubt about that?

A. No.

Q. Would you open this container also, please.

The contents are those that you examined?

A. Yes, they are.

[T.549] Q. They appear to be in the form of wood, is that correct?

A. Yes, they are.

Q. And included in the couple cases, some tile pieces still attached?

A. Yes, that is correct.

Q. Is this item I have now drawn out representative of the others that are in there?

A. Yes, it is.

MR. BYRNE: May I show it to Counsel and jury?

THE COURT: You may.

BY MR. BYRNE:

App. N3

Q. There are items like this in the container, isn't that so?

A. Yes, they are. That is correct.

Q. Next is State's Exhibit 20. Would you see if you can identify that, please?

A. Again, that is one of the items that we received in the initial submission of evidence. And again, it has my yellow label and evidence tape on it. This item was received as Item C-6. It contains wood which is labeled to have come from the second tread of the steps.

Q. On the ground level, if you know?

A. I don't specifically know.

Q. Did you conduct the same examination on that exhibit?

[T.550] A. Yes, I did.

Q. And were you able to reach a conclusion as to the presence of an accelerant?

A. This item also contained gasoline.

Q. Would you open that as well, please.

Are the contents that which you examined?

A. Yes, they are.

MR. BYRNE: May I show them to Counsel and the jury, Your Honor?

THE COURT: You may, Counsel.

BY MR. BYRNE:

Q. Next item would be A-10, as designated by the Sheriff's Office and received in evidence here as State's Exhibit 22. Can you identify that, please?

A. Yes. A-10 was also received in the original submission of items. Again it has the identification tape and my labeling tape. This item contains green carpeting from the living room floor.

Q. Did you run the same analysis of that sample?

A. Yes, I did.

App. N4

Q. Were you able to reach a conclusion as to the presence of an accelerant?

A. Yes, I did.

Q. What was that conclusion?

A. Gasoline was detected in that item as well.

[T.551] Q. Would that have been—Let's open it for a moment.

As already been shown to the jury and examined by Counsel, there are two items: One appears to be a carpet; is that correct?

A. That's correct.

Q. And under that, what appears to be some wood?

A. Some piece of wood, yes.

Q. Do you know in which of the items—or whether you found the accelerant in both items?

A. No. Once the evidence is in this container, such as this, there is no way to essentially separate the items for examination through diffusion, and simply being in the close proximity with one item next to the other. Anything that might be well on one, they will get transferred to the other and vice versa.

Q. Next as received here in evidence as State's Exhibit 24, I wonder if you could take a look at that and tell us if you recognize it?

A. Yes. This item was received by me as Exhibit B-37. This item contains wood from the northeast bedroom floor.

Q. And did you run the same test on that?

A. Yes, I did.

Q. With what result?

A. This item also contained gasoline.

App. O1

APPENDIX O

Transcript Excerpts of Testimony Pertaining to Gasoline Odor
[T.141] Stanley Owens—Direct

* * * start those fires?

A. Yes, sir.

Q. Often?

A. All the time.

Q. And have some of those drills been conducted in abandoned or otherwise homes, structures, dwellings to be destroyed?

A. Yes. That's our primary source of drill when setting the fires is in those types of structures.

Q. How many fires do you suppose you staged in dwellings as a volunteer fireman in which you used gasoline in starting a fire and then put it out?

A. Well, as I stated earlier, we use gasoline primarily on all of them to start the fire. And I would say probably 45 to 50 burns, because we get three or four out of every house that we have.

Q. And in conducting those drills and after the fire is extinguished, have you ever been able to detect just with your nostrils, without any sophisticated equipment, the odor of gasoline from those fires?

A. Not really, no.

Q. What are the common or dominant odors in such fires?

A. Well, mostly just the predominant would be the material that we have been burning: straw, old furniture that is given to us or whatever.

[T.142] Q. But not gasoline?

A. But not gasoline, no.

MR. BYRNE: Thank you, Mr. Owens.

THE COURT: Thank you, counsel.

Mr. Cascarano, you may inquire.

CROSS-EXAMINATION

BY MR. CASCARANO:

Q. Mr. Owens, when you came on the scene of the townhouse, you indicated most all of the windows had flames coming out; is that correct?

A. Yes.

Q. Now, this diagram that we have, or this model that we have, of the house here, you recognize this as being the north part of the four townhouses there?

A. Yes.

Q. It is true, is it not, that when you came on the scene, there were no flames coming from—

THE COURT: Mr. Cascarano, can I interrupt? I just want to be sure that the jury can see. You can use the pointer here too.

MR. CASCARANO: Maybe I can stand behind. Is that better?

Q. (By Mr. Cascarano) It is true, is it not, Mr. Owens, that when you came on the scene, there were no flames coming out of this top front window; that is true, is * * *

* * *

[T.156] Gary Giving—Direct

THE COURT: Sustained.

One or two foundational questions, Mr. Byrne.

Q. (By Mr. Byrne) During all your time as a fireman, including when you were being trained, have you participated in drills involving fires started with gasoline?

A. Yes, I have.

Q. How many, would you estimate?

A. A dozen.

Q. Were you present when gasoline was applied?

A. Yes, sir.

App. O3

Q. Did you see the gasoline cans or did you see the gasoline itself?

A. I seen the cans. I have seen the gasoline applied.

Q. Then my question is: In those dozen fires started by gasoline, after the fires were put out, were you ever able to detect the odor of gasoline?

A. No.

Q. What is the dominant odor?

A. Heat, burnt smoke smell.

MR. BYRNE: Thank you, Mr. Giving. I have nothing further.

THE COURT: Thank you, counsel.

Mr. Cascarano, you may inquire.

CROSS-EXAMINATION

* * *

[T.165] Gary Giving—Redirect

* * * correct me if I'm wrong—that you said that at the fire scene, the idea of gasoline did not enter your mind; is that correct?

A. That's correct.

Q. But sometime later did the use of gasoline enter your mind?

A. I would say yes, after the fire.

Q. After the fire?

A. Was extinguished. Something was weird.

Q. Have you ever been in a fire situation where in fact you did smell gasoline when the fire was still burning other than possibly at your drills?

A. No, sir.

Q. How about at the drills?

A. Repeat what you said.

App. O4

Q. Do you recall ever smelling gasoline at the scene of a fire when you knew gasoline was there because it was used to start the fire during your drills?

A. Before?

Q. At any time.

A. Yes.

Q. When?

A. At our drills.

Q. Before the fire, during the fire or after the fire?

A. Before.

* * *

[T.173] Ronald Boman—Direct

* * * gasoline?

A. Yes, we do.

Q. How many of those drills have you participated in or observed or directed as training officer or chief?

A. I would probably have to say ten to 15.

Q. In those fires that you knew were started by gasoline, was the odor of gasoline detectable during or after the fire was put out?

A. No, it wasn't. After we entered the building after we put the fire out, there was no detectable odor of gasoline in the building.

Q. Let me direct your attention for a moment, Mr. Boman, to what has been received here as State's Exhibit 3. I would ask you if you have had a chance to examine that at any length to determine what it is.

A. Yes, I have. It is a duplicate of the building that the fire was in.

Q. And the one portion of it contains furniture; is that correct?

App. 05

A. That's correct.

Q. And another portion of State's Exhibit 3, a model, is empty. Do you know what that section of that exhibit is?

A. That would be the adjoining townhouse complex that would be adjoining the burned building.

* * *

[T.1610] Shelby Gallien—Cross

* * * gasoline, put them out, started another fire, put it out; started other fires, put them out, in the same house; they did this numerous times, and said it was common that they did not smell gasoline after getting in there and putting out the fire. Would you disagree with them?

A. I would have to know the individual. If I walk into that fire—

Q. If there was more than one individual?

A. If there was more than one individual. Your nose may get acclimated to that gasoline odor, and you are immune from smelling it.

Q. Well, something else can happen too, can't it? If there is any sign of gasoline left, it will be clouded over by other scents of the fire; isn't that so?

A. Possibly other scents may overrule it, a stronger odor of something.

Q. Isn't it also so that one of those odors being smoke, which would have that impact?

A. Smoke has a strong odor, and it may override any other odor that you have.

Q. There's a lot of steam around when you first go into a place like that?

A. There is possibly a given amount of steam from the water in contact with the fire, that is correct.

* * *



APPENDIX P

Transcript Excerpts of Fire Marshal Bruce Ryden's Testimony [T.2110] Ryden—Direct

MR. CASCARANO: I am going to object to any testimony except in regard to flashback. I don't need to state.

THE COURT: Sustained.

BY MR. BYRNE:

Q. Do you know what the term "flashback fire" is?

A. I am not familiar with it. It hasn't been used until I heard Mr. Gallien talk about it the other day.

Q. You know he used the term to describe a certain kind of fire?

A. Yes, sir.

Q. Are you familiar with that kind of fire?

A. Yes, sir.

Q. What do you call it?

A. A backdraft.

Q. Could you explain the characteristics of that kind of a fire, please?

A. Backdraft is one where the room—take in this case, a living room or a kitchen area that is enclosed, with windows closed. The smoke builds up at the ceiling level and the oxygen level will drop down to a point where it will either go out or unless it receives a new source of oxygen. It is a great problem for the firefighters because of the fact when this type of condition exists, when they open up the door [T.2111] and bring in a line or hose, oxygen is now readmitted to the fire and it will cause a backdraft or a smoke explosion.

But it does have to be in a confined room.

Q. Like what?

A. All windows and doors closed. No communication to free oxygen.

Q. And why is that so?

A. Because you can't get that much heat buildup in there and get a concentration of products in the room.

Q. You say when the firemen open the door and oxygen would go in, what would happen?

A. You would have a very violent explosion.

Q. Would there be an open flame before that oxygen is introduced?

A. Probably not. There probably would be some glowing embers, but not open flame, no. You cannot have an open flame and have a backdraft.

Q. The flame would start when there is new oxygen, is that what you are saying?

A. That's correct.

Q. How instantaneous would that flame spread through the enclosed area?

A. Immediately.

Q. Would there be an isolated fire in a section of the [T.2112] room existing for any significant time at all?

A. No, sir.

Q. Would that enclosed room have a heavy concentration of smoke before the introduction of new oxygen which causes the flash fire?

A. Very definitely.

Q. And smoke is lethal if you inhale it?

MR. CASCARANO: Objection, leading.

THE COURT: Sustained.

BY MR. BYRNE:

Q. Is it lethal?

A. Yes, sir. The basic component is carbon monoxide and carbon monoxide is a known toxic gas.

Q. If someone were in the enclosed townhouse, first floor, in approximately—maybe a precise cubic footage of 5,888—

and there was enough accumulation of gases to cause a flash-draft fire, would you expect somebody in the building, when that fire started, to survive the smoke?

A. No, sir.

Q. Have you investigated fires of a smoldering nature with some frequency?

A. Yes, sir.

Q. Is there any rule of thumb that one might expect as to the survival rate of any sleeping occupant in such [T.2113] a fire?

A. Well, in order to have the decreased burning level, the oxygen level within the room would have to decrease below the normal—in this room, approximately 21 percent oxygen. Fire requires approximately the same percentage of oxygen as do human beings. As the oxygen level was consumed within that room, it is going to drop from 21 percent down to 15, to 10. And, as it drops below 15 percent open flame and combustion ceases. As it drops down to 10 percent oxygen level, the amount of carbon monoxide that has built up in the room and also in the occupant of that room, causes a great deal of disorientation.

As the oxygen level further drops due to smoldering combustion, once it gets down to approximately 6 percent, all combustion will cease and all life will cease. But once it drops below 10 percent, the mortality rate is extremely high.

MR. CASCARANO: What was that last rate, 10?

THE WITNESS: 10 percent, yes.

BY MR. BYRNE:

Q. In your work as a Fire Marshal, have you experience, personal experience with gasoline fires?

A. Yes, sir.

Q. You train Roseville Firemen in connection with your

* * *

3
Supreme Court, U.S.
FILED

NOV 26 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the United States Supreme Court review a garden variety state court judgment, which reversed a criminal conviction for evidentiary insufficiency on adequate and independent state grounds, when the decision below neither rests on nor construes any federal issue and when Petitioner did not raise any federal issue in the court below?



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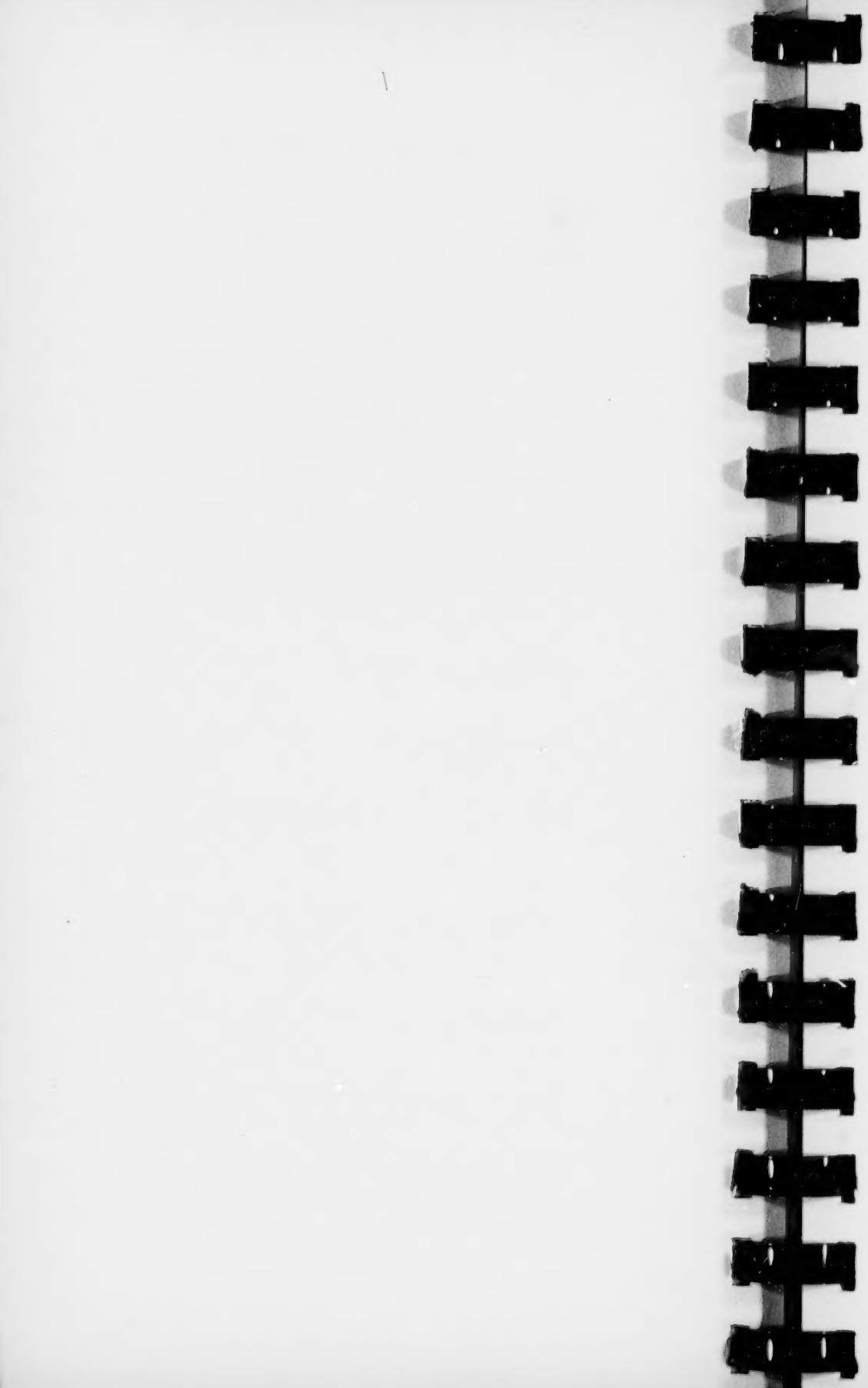


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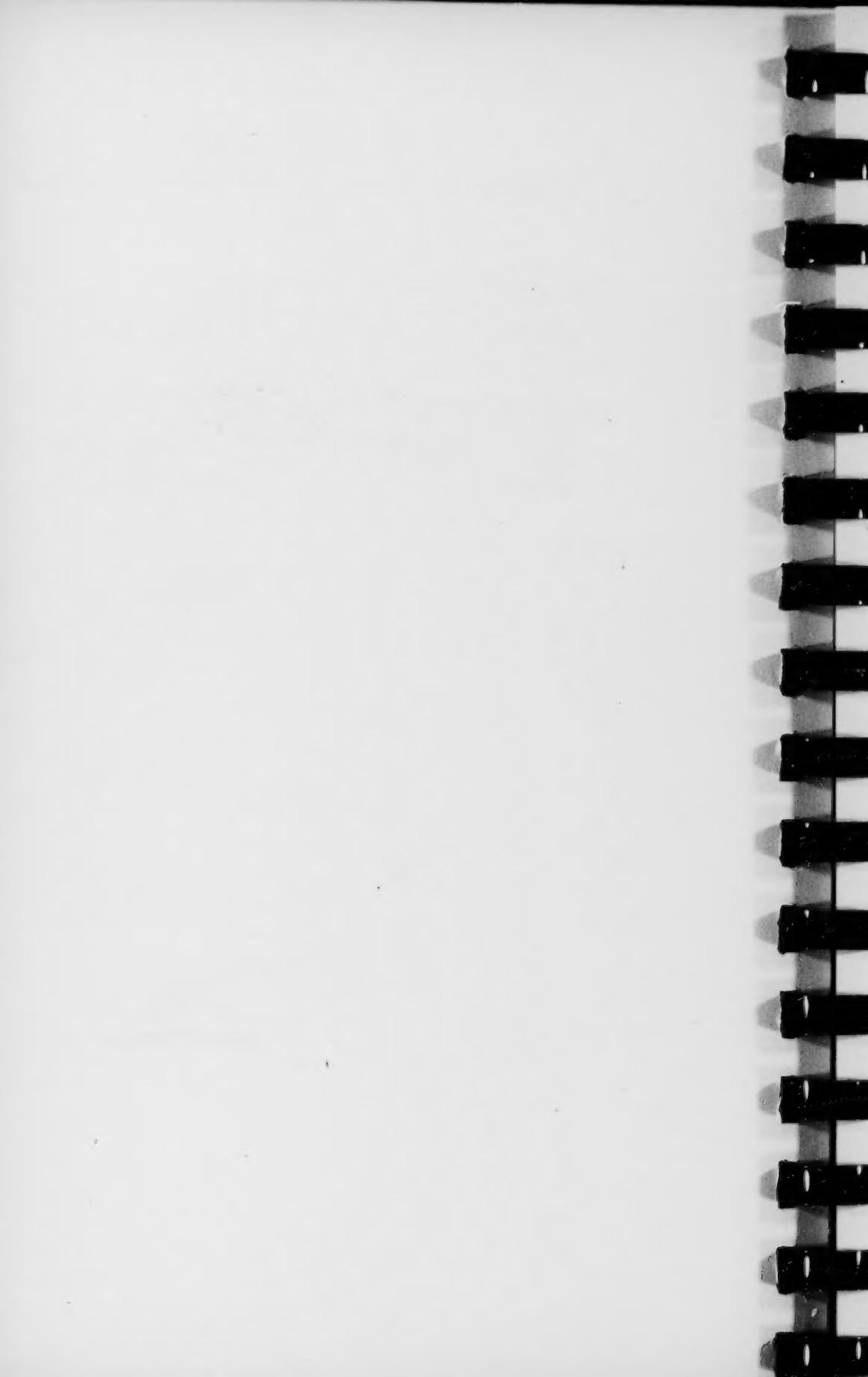
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STATEMENT OF THE CASE

A. Introduction

Respondent accepts the facts as set forth by the Minnesota Supreme Court at 392 N.W.2d 876.

On March 21, 1986, the Minnesota Supreme Court unanimously reversed Orville Skip Berndt's convictions because " . . . the evidence was insufficient to sustain the convictions." (Unpublished Slip Opinion, at 2). That opinion did not rest on or construe any federal issue. The State of Minnesota filed a petition for rehearing asking the Minnesota Supreme Court to remand the case for retrial. In its petition for rehearing, the State of Minnesota did not raise any federal issue. Quite the contrary: The State of Minnesota assured the Minnesota Supreme Court that retrial was permissible. The State also reminded



the Court that it had "repeatedly held" that circumstantial evidence should be given the same weight as other types of evidence so long as the circumstances proved are consistent only with guilt and inconsistent with any other rational hypothesis. The State did not argue that this standard violated any federal rule. The State argued that the evidence satisfied that standard. The petition for rehearing was denied on August 29, 1986. On that date, the Minnesota Supreme Court withdrew its opinion of March 21, 1986, and again unanimously reversed Skip Berndt's convictions because ". . . the evidence was insufficient to sustain the convictions." State v. Berndt, 392 N.W.2d 876 (Minn. 1986). This decision of the Minnesota Supreme Court did not rest on or construe any federal issue. The Court made this clear in the following footnote to its

decision:

In addition to raising the insufficiency of the evidence issue, appellant [Berndt] has alleged violation of discovery rules, an unconstitutional search, and deprivation of a fair trial. Our disposition makes it unnecessary to address those issues.

Berndt, fn. 1 at 876. The State of Minnesota now asks this Court to reinstate the convictions because retrial is prohibited and because the circumstantial evidence standard was improper.

B. Orville Berndt Is Innocent Of These Crimes, The Government Failed To Prove His Guilt, And A Unanimous Minnesota Supreme Court Has So Held.

On August 20, 1981, Skip Berndt returned home from work at approximately 6:00 p.m. (Trial Transcript, p.1119, hereinafter cited as "T"). He worked at Continental Baking Company as a sales supervisor (T.1109). As Skip changed his clothes, his wife Brenda cooked a pizza

for the children for supper. Because the smoke alarms in the townhouse complex were overly sensitive and the exhaust ventilation was very poor, the residents frequently disconnected them when using the ovens (T.282). Skip did this (T.1119).

Skip and Brenda then left to meet with their automobile insurance carrier so that a used car they had recently purchased could be properly insured (T.1120). After taking care of the insurance, they had a night out with friends to celebrate the car purchase. After visiting two bars, they ended up at the Earle Brown Bowl. They arrived about 10:30 p.m. and stayed until 1:00 a.m. While there, they drank and visited (T.1121-1124). Everyone described Skip and Brenda as having a good time and saw no problems, difficulties, fights, etc. (T.636,646,649,660,678,953).



They left the Earle Brown Bowl together and arrived home about 1:10 a.m. (T.1124). Skip hadn't eaten supper that evening so he went into the kitchen and fixed something to eat (T.1125). He laid down on the couch and watched television (T.1126). Skip fell asleep (T.1128), he woke up, he wasn't sure if it was Brenda who woke him up or something else (T.1130,1131), but he saw flames by the dining room window (T.1130). At this time, the house was full of smoke and extremely hot. Skip was confused and panicked. He saw Brenda heading towards the kitchen area and he ran out the "front door" (T.1130). After he left his home, the house burst into flames (T.1132).

As Skip came out the front door, his next-door neighbor, Charles Catron, came out his door (T.255). Skip started screaming for the fire department



(T.1135). Mr. Catron had come out because his wife woke him and told him of the fire next-door (T.242). Mr. Catron crawled into Skip's house, over an area the State contended gasoline was present (T.548), and got into the kitchen. He saw Brenda's feet but could not see the rest of her because the smoke was so heavy. He burned his finger on the metal strip that held the carpet down at the line between the dining room and kitchen (T.257-260) (Appendix, p.99).

When the police arrived, Skip was trying to put the fire out by using a garden hose (T.62-63). Officer Robert Adams of the Brooklyn Center Police Department was the first on the scene. Officer Debra Christman arrived later. When she arrived, the second story of the home was not aflame (T.82). Adams spent some time looking for a ladder to rescue anyone upstairs, including kicking in a



door to the caretaker's maintenance equipment garage (T.63). He found no ladder. Officer Adams kept calling the fire department to tell them how serious the fire was (T.61-62). The neighbors who reported the fire said that the fire fighters did not arrive until ten to thirty minutes after the fire was reported (T.229,283). The fire was initially under control until the pumper truck ran out of water (T.229,231,283-284). The fire was controlled approximately 35 minutes after the fire department arrived (Omnibus Hearing Transcript, p.46; T.728).

Because Skip's hysteria interfered with the fire fighters, Officer Adams took Skip to Skip's sister's home in Maple Grove. In the car ride, Officer Adams detected no odor of gasoline (T.77). While Skip was outside watching his home burn, a neighbor hugged him.

She detected no odor of gasoline (T.251). Officer Adams was later instructed to bring Skip Berndt back to the Brooklyn Center Police Department for interrogation. Officer Adams was instructed that Berndt had no choice to refuse and that he was to be treated as a suspect (O.H.T.16,101). The Brooklyn Center Fire Marshall considered the fire an arson based on of how much of the home was burning when the fire department arrived (T.719).

Skip told the officers what happened that evening (T.115-118). In the interview, Skip was wearing the same clothes he had on while at the scene (T.969). The left side of his arms and face were singed (T.1054). However, no one detected the odor of gasoline (T.1055). Skip Berndt's clothes were not confiscated (T.347). Skip was requested to and did consent to being taken to



North Memorial Medical Center to draw blood for purposes of evaluating the alcohol content (T.118-119). No one from the Medical Center testified to any gasoline odor on Berndt or his clothing. Berndt's family perished in the fire.

In reversing Berndt's convictions, the Minnesota Supreme Court gave due deference to the jury's verdict. Berndt, at 880. Accordingly, for the purpose of analysis, the Minnesota Supreme Court accepted the State's theory that five gallons of gasoline was used to start the fire.¹ Even after making such

¹ At the trial, the State failed to disclose and deliver all of the "positive" chromatograms prepared by the State's chemist. In post-trial proceedings, the defense chemist testified that the withheld chromatograms showed contamination and an invalid chromatographic analysis of the fire samples. The chemist testified that the State's chemist manipulated the chromatographic readout to attempt to duplicate (footnote continued next page)



assumption, the Court reversed because "[t]he state's entire case was bottomed on mere speculation or upon hypothesized 'facts' not in evidence." Berndt, at 880.

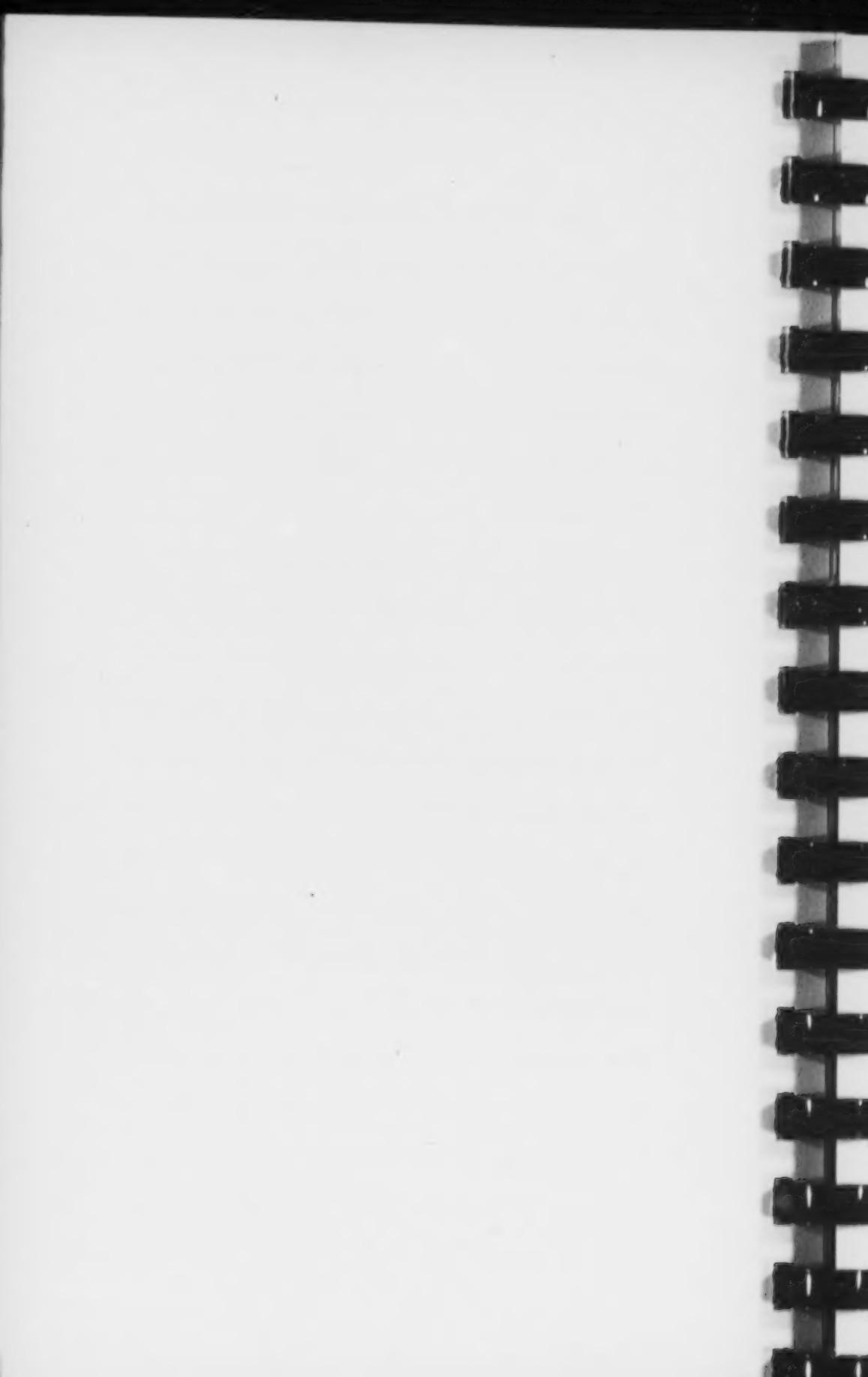
The following is just one example of the speculation the Minnesota Supreme Court rejected.

Notwithstanding the absence of even a scintilla of evidence from any lay or professional witness of any concussion, blow, or fracture to Brenda's head, the state urged the jury to speculate that Berndt and his wife had fought that evening, resulting in a blow to Brenda's head sufficient to render her unconscious.

Berndt, at 881.

gasoline. The defense chemist testified in post-trial proceedings that the withheld evidence showed how the State's chemist erroneously concluded gasoline was present in 5 of 26 samples taken from the home. The defense chemist testified in the post-trial proceedings that the State's method of analysis was not scientifically accepted (Appendix, pp.27-37,42-53,109-111).

In its Petition for Certiorari, the State asks this Court to engage in the same speculation previously rejected twice by the Minnesota Supreme Court. The State alleges the fire was motivated by financial gain. There was no evidence that Berndt knew of any life insurance on his wife. The evidence that was introduced suggests that Berndt did not know of the life insurance (T.118). In any event, the policy was little more than a burial policy. Berndt was not a named beneficiary; the insurance had been in existence since 1978; no increase in amount of insurance was ever requested; the policy was an automatic benefit of employment (T.706-709). The State also speculates with respect to a financial motive concerning the credit life car insurance. However, Berndt did not know the car loan was paid off after his wife's death (T.1244,1254). He had the



same type of loan in the five years preceding the fire. The credit life aspect of the loan was automatic and normal with Community Credit (T.695-697).

Although Berndt was not a wealthy man, he had just received a promotion with more pay (T.1116). Further, there was no evidence the bill collector was hounding him. Community Credit believed Berndt was financially stable. This was a normal two-income family with no proof they were financially overextended. Each had been divorced previously and knew how to end a marriage if either so desired. The State's invitation to the jury to speculate was properly rejected by the Minnesota Supreme Court.

The State also speculated that because Skip Berndt had been promiscuous in the past, he murdered his family. In its present petition, the State mentions that at the Earl Brown Bowl a female



friend of Berndt accompanied him to the parking lot to see his new used car. Even though she testified that nothing of a promiscuous nature happened, the State asks this Court to so speculate. The Minnesota Supreme Court dealt with that invitation as follows:

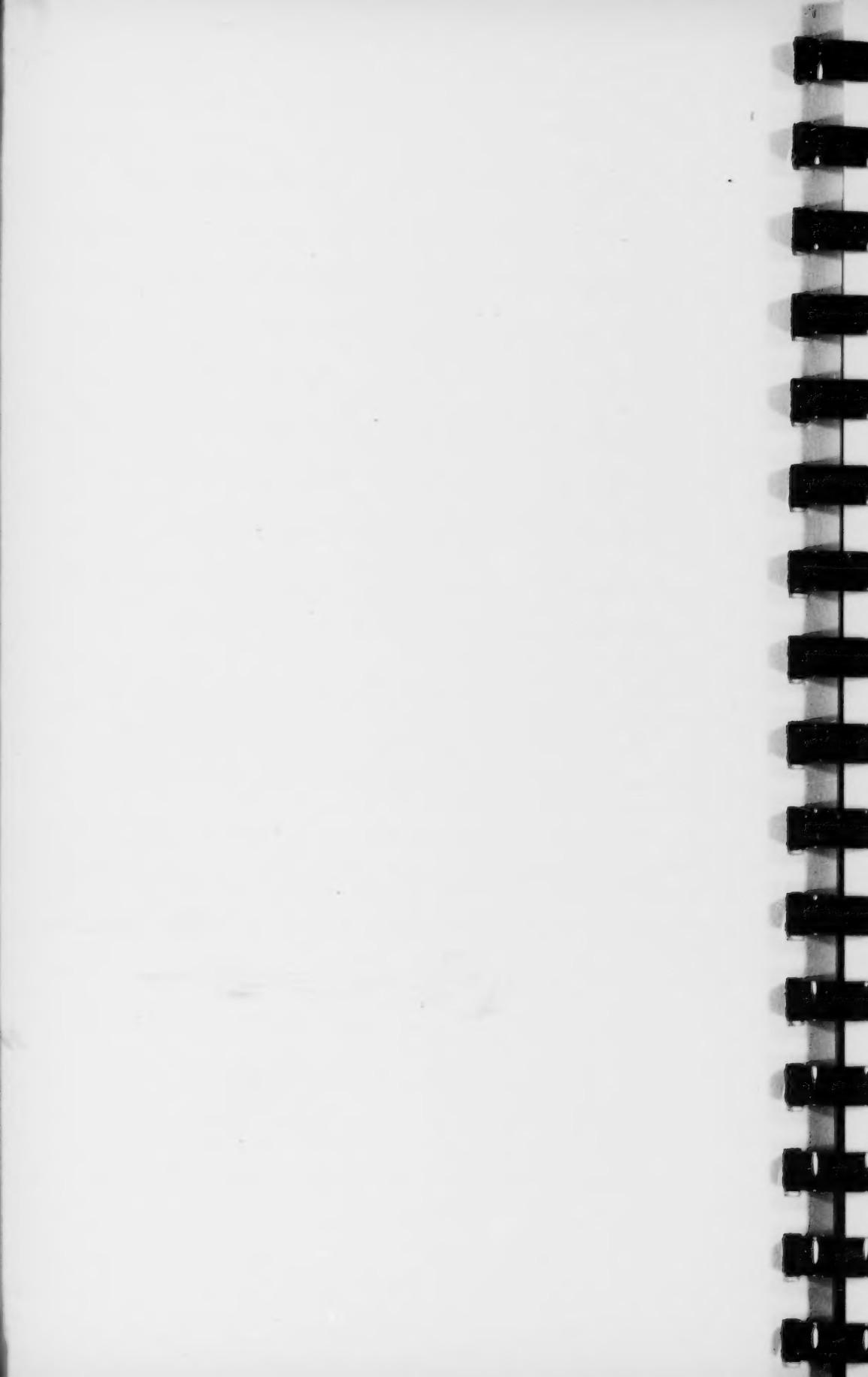
Though admitting that in the years before the fire there had been problems between himself and Brenda because of his alleged philandering, the evidence was unrebutted that those disagreements had been ironed out long preceding the fire.

Berndt, at 880.

The State says Berndt could not have gotten out of the house without severe injury. However, the testimony of the State's own witness, Charles Catron, disproves that contention. Mr. Catron testified that Skip and he came out of their homes at the same time (T.255). However, Catron reentered Skip's home almost immediately (T.257). Catron



crawled through part of the same area Skip said he went over, an area the State claimed contained gasoline (T.257-259), and therefore impossible to crawl through or run over. Mr. Catron experienced only minor injuries (T.258). As a matter of fact, Mr. Catron got into the house as far as the metal strip separating the carpeted area from the linoleum area and to the feet of Brenda (T.258-259). If the State was correct, Charlie Catron could not have gotten into the house because he would first have had to go through burning gasoline vapors and very hot linoleum tile (Appendix, p.99). The jury viewed an experiment which showed linoleum tile burning with gasoline. The tile retained its high heat of over 700° for a long time. Charlie Catron would not have been able to get in. If the State's theory was right, Charlie Catron would have perished in the fire or been



severely disfigured. He wasn't. He experienced some singeing (consistent with Berndt's injuries) and only "burned" himself when he touched the metal stip (T.260). Contrary to the State's theory, he saw no flames in the kitchen or entry as he went in (T.269-270). Berndt's mother, sister, and Berndt testified to the condition and terrible pain of his feet (T.1144,1238,1253).

The State introduced evidence to show that Berndt, based on his consensual blood test, was intoxicated at the time of the fire. His blood alcohol content was estimated to be .13% at the time of the fire. Brenda's was .25%. The State also theorized that a minimum of five gallons of gasoline was used to start the fire. The State presented no evidence to link Berndt with any gasoline. The evidence that was introduced disproves such a link. The State says Berndt could



have siphoned some gasoline. No siphoning equipment was found. No one reported any gasoline missing from any cars. The caretaker said his gasoline was where it should be and didn't appear to be tampered with. However, the caretaker's gasoline was an oil mix. No gasoline container was found. The garbage dumpster was not searched. Even so, the State asked the jury to speculate and provide this missing information.

The State has no proof how the five gallons was spread. Was the five gallons carried in small containers of one gallon? If so, the process would take a great deal of time. First, one gallon would need to be siphoned; then transported to the house; then spread throughout the house. That process would need to be repeated five times with only two results. One, the chances of any of the occupants smelling the gasoline and



leaving is greatly enhanced. Two, the gasoline would vaporize a long time and the entire complex would explode and be destroyed.

If the State's theory is that the gasoline was spread quickly, an intoxicated man who had not slept in 21 hours would have spilled some on himself. However, no one smelled gasoline on him. The neighbor who consoled him at the scene did not smell any. The veteran police officer who was with Berndt in a closed car for about forty-five minutes smelled no gasoline. The chaplain and police officers who interrogated Berndt in a closed room smelled no gasoline. There was no evidence that any gasoline was noticed at the hospital. Even though Berndt had the same clothes on, they were not confiscated for analysis.

The State urges in its petition that this absence of proof is not crucial.



The State is wrong. Although some experts testified that it is not uncommon not to smell gasoline used to start a fire, i.e. gasoline that is already burning, they did not testify that if a person spilled some in spreading the gasoline, that it would not be smelled on the person. Trained firefighters testified that they were taught to scream "gasoline" if they smelled any while fighting a fire. At trial, a trained investigator and former police officer could still smell gasoline that was burned on Exhibit M months before trial (T.1287). The undisputed testimony is that gasoline upon being spread immediately starts to vaporize. Also, gasoline vapors are attracted to the groin and armpit areas. The gasoline vapors exhibit instantaneous ignition throughout the house. Had Berndt spread five gallons of gasoline, he would have



been covered by gasoline vapors and would have caught on fire. The testimony relied on by the State regarding set fires is not relevant because the substance was a gasoline/oil mixture which is considerably less odorous and explosive than gasoline (T.164). In any event, a fireman at the scene said the fire had an average amount of smoke and did not have rapid acceleration (T.159-160). He also said that gasoline used to start a fire can be smelled at the scene and that he hadn't considered that gasoline was used to start this fire even though he had been a firefighter for 16 years (T.162-163).

Finally, the evidence was undisputed that Berndt loved his children. The youngest one insisted on sitting on Berndt's lap at dinner at family gatherings. He coached the older two boys in Little League and had just

purchased them bicycles for their birthdays. The State speculated that killir the boys would make the wife's death appear more natural. The Minnesota Supreme Court rejected such speculation. The examinations of the bodies prove these deaths were the result of a terrible accidental fire. The State says gasoline was poured throughout the house, upstairs, downstairs, and in the bedrooms. Once gasoline is spread, it starts to vaporize. All of the vapors instantaneously ignite throughout the house like a chain reaction. The medical examiner testified that when one breathes superheated air, the lungs instantly burn and death follows without any further breathing and absorption of carbon monoxide. Therefore, if the State's speculation is correct, Brenda would not have had close to a fatal amount of carbon monoxide. She would have had



virtually none. Also, the boys would have breathed superheated air caused by the ignition of gasoline vapors in their rooms (T.935). They would have died with little, if any, carbon monoxide in their system. Rick had 75%, Corey had 72%, and Mike had 90% carbon monoxide. They died as the result of a smoldering fire.

Brenda's level of 25% is indicative of awakening confused, smelling smoke, going downstairs, saying something to wake up Berndt, breathing superheated air and collapsing.

In finding the evidence so lacking, the Minnesota Supreme Court stated the following:

Although police and fire officials essentially had exclusive control of the fire remains for at least four days after the fire, they found no containers which could have held the gasoline used as an accelerant, nor did they find siphoning equipment to link Berndt to this fire. Notwithstanding the absence of such



tools, the state, by pure speculation, theorized either that (1) appellant had stolen the gas from the caretaker's supplies, or (2) appellant had siphoned the gas from cars in the parking lot, or (3) the reason no gas can or siphoning equipment was found was that in all probability Berndt had thrown it into a garbage dumpster which had been unloaded the morning after the fire.

All three of those contentions were purely speculative with no factual basis. . . . In sum, nothing in the evidence justifies an inference establishing a nexus between appellant and the gasoline --at least 5 gallons of it --used to accelerate the townhouse fire.

Berndt, at 879.

C. The State Of Minnesota Has Improperly Included Material That Is Dehors The Record.

The State of Minnesota included material that was outside the appellate record in its petition for rehearing filed with the Minnesota Supreme Court and in its petition for Writ of Certiorari filed with this Court. There can be no justification for such improper

conduct. The Minnesota Supreme Court has so held:

It is elementary that the supreme court is vested only with appellate jurisdiction . . . Appeals, therefore, must be decided solely upon the evidence actually presented to the trial court and shown by the record on appeal . . . Affidavits, filed or obtained after the trial, obviously could not have been presented to the trial court and are entitled to no place in the appellate record and briefs. Clearly, they may not be considered as part of the evidence by a court of review.

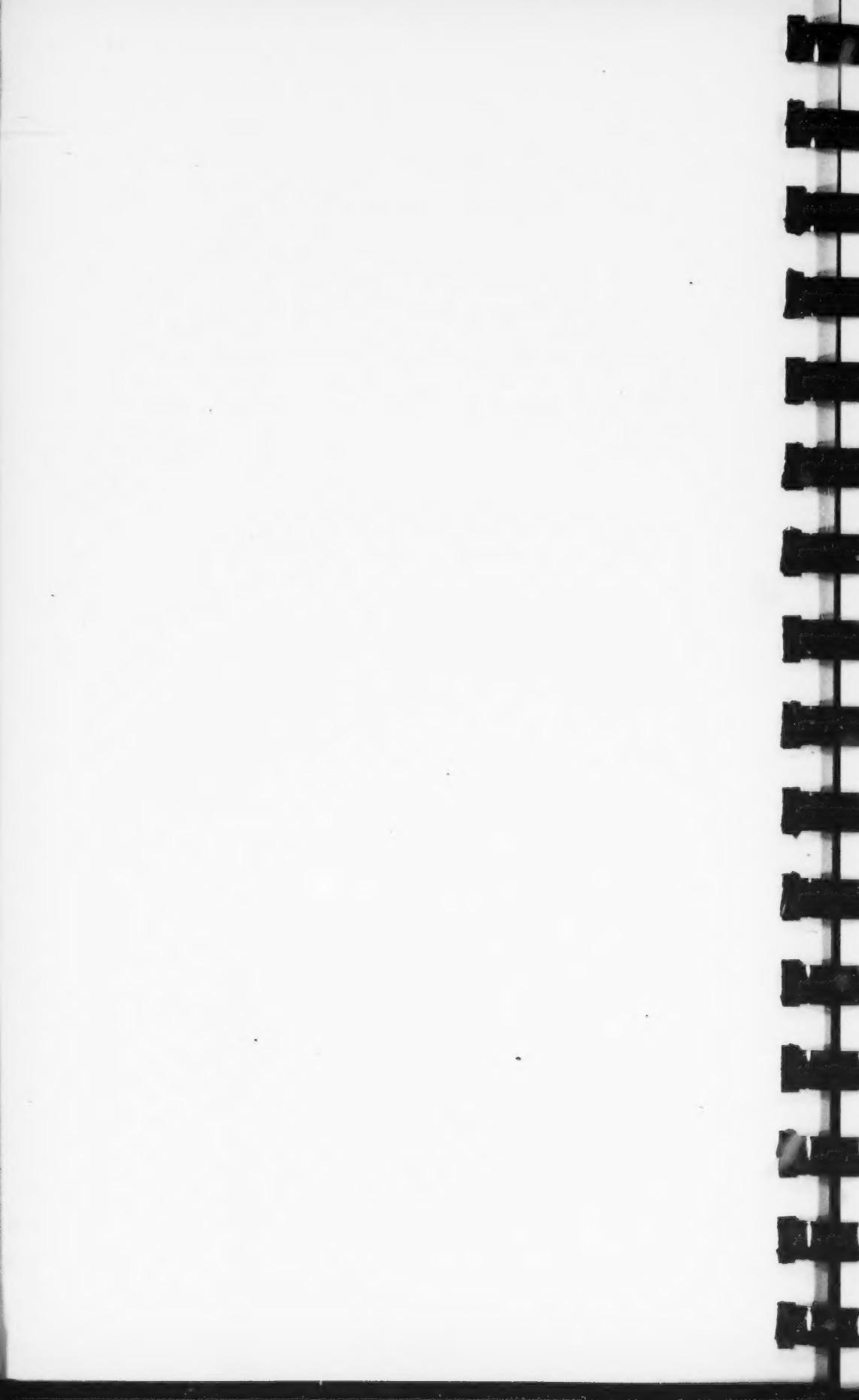
Holtberg v. Bommersbach, 235 Minn. 553, 51 N.W.2d 586, 587 (1952).

However, the State of Minnesota rationalized the appropriateness of this conduct by assuring the Minnesota Supreme Court that retrial was not prohibited and this information was merely to show the Minnesota Supreme Court that another trial would include different evidence. In its Petition for Writ of Certiorari, the State of Minnesota now assures this



Court that retrial is prohibited. But the State still includes material that is outside the record. There is no justification for this conduct. The State of Minnesota has alleged that Skip Berndt admitted setting the fire and that Professor Shelby Gallien is under investigation for his skills in fire investigation. Both of these allegations are false and the State of Minnesota has the necessary information to so show. Counsel for Respondent directs the Court to Respondent's Appendix which more fully sets out this rebuttal in Respondent's Opposition to Petition for Rehearing (Appendix, pp.121-186).

Skip Berndt is innocent of setting this fire. He said he was innocent during the one year the case was investigated by the State. He said he was innocent during the second year the case was prepared for trial. And he



maintained his innocence during the time he was in prison (Appendix, pp.175-177). The State of Minnesota asks this Court to assume jurisdiction based on the assertions of a person who has been convicted of the felonies of aggravated robbery with a gun on January 12, 1977; theft and attempted escape on February 29, 1980; escape on November 14, 1980; theft from person on January 12 1983; robbery on March 18, 1983; a second robbery on March 18, 1983; and escape on April 3, 1986. This individual also offered to lie for another inmate who was charged with a crime and awaiting trial (Appendix, p.186). This person said the only interest he had was to be transferred to Lino Lakes, a minimum security institution. He was. This person escaped from Lino Lakes in 1985. It defies logic that Berndt would "confess" to this stranger (Appendix,



pp.178-199). While watching a news program about an arson fire, Berndt's ambiguous statement of being charged with the same thing, in the mind of the ex-convict, became an admission one year later when he had something to sell to the State. Clearly, if a defendant would present this type of material as a basis for a new trial, the State would not deem it worthy of response.

One of the State's witnesses, the fire marshall of Roseville, filed a complaint against Professor Shelby Gallien. The State argues that Professor Gallien changed his position during cross-examination. That is false. He simply stated that the fire investigators had not conducted a thorough enough investigation to rule out the various sources of accidental fire. The National Association of Fire Investigators honored Professor Gallien in August, 1985, as



their Man of the Year. The award was based on Professor Gallien's fifty years of service in the field. He was honored for his pioneering efforts in establishing fire schools and seminars and for his assistance in establishing the International Association of Arson Investigators and the National Association of Fire Investigators. The President of the National Association of Fire Investigators concluded the complaint was without merit and dismissed it (Appendix, pp.180-185). The President also concluded that the Roseville Fire Marshall lacked even an elementary understanding of the field of fire and arson investigation. The President advised that the Roseville Fire Marshall contact the International Association if he wished to continue the matter. However, the President informed the Roseville Fire Marshall that Professor



Gallien had suffered a series of debilitating strokes which have left him bedridden, blind, and without mental faculties (Appendix, p.181). Professor Gallien lives in a nursing home in his hometown. He is not avoiding investigation.

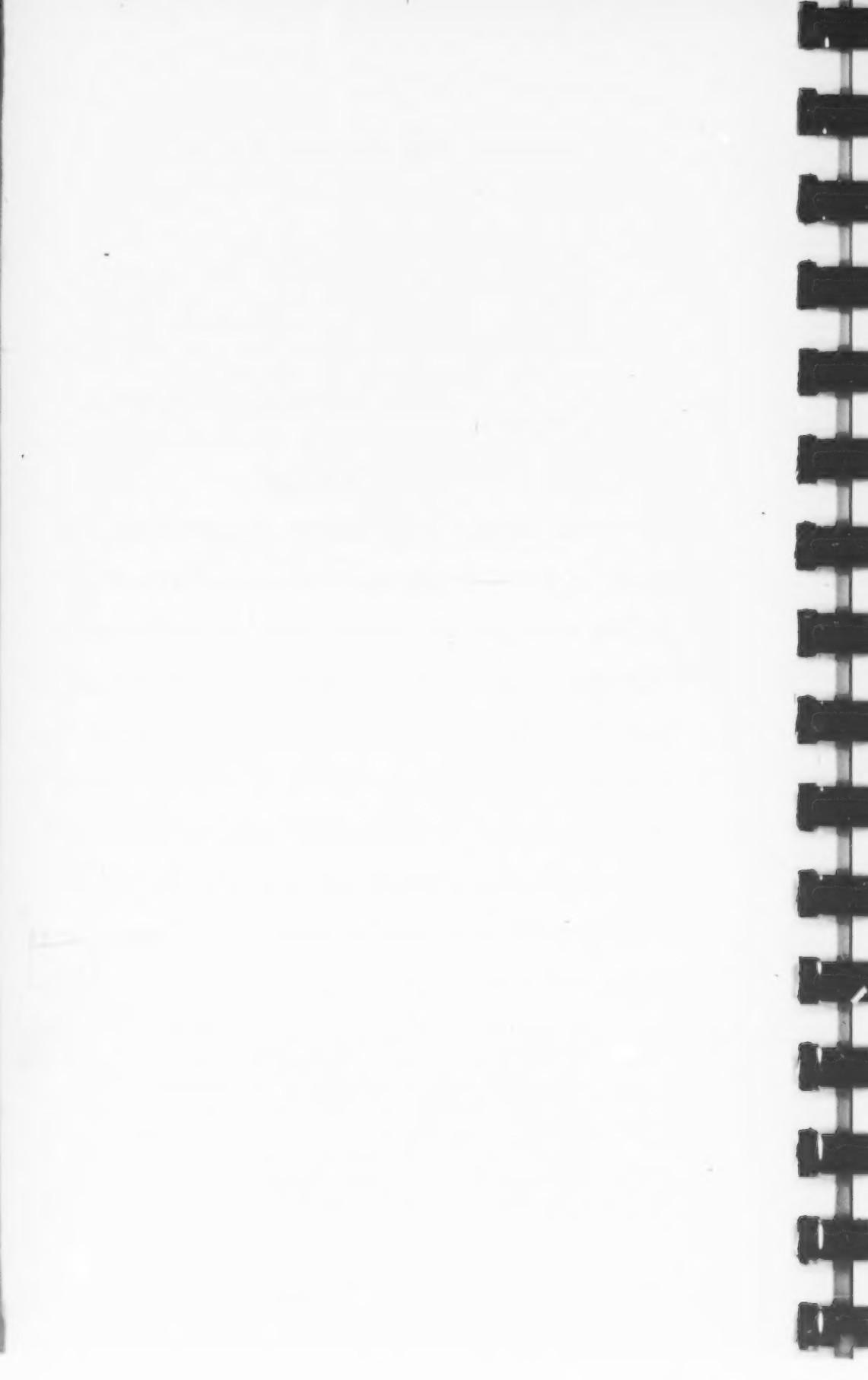
REASONS FOR DENYING THE WRIT

- I. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW THE DECISION BELOW. NO FEDERAL QUESTION WAS FRAMED, RAISED, OR PRESENTED BY PETITIONER OR CONSIDERED BY THE COURT IN THE PROCEEDINGS BELOW. THE DECISION BELOW PRESENTS NO FEDERAL QUESTION.

Introduction

The State's position, simply put, is that anytime a party disagrees with a state court's decision, the United States Supreme Court has jurisdiction to review. The Supreme Court of the United States has no jurisdiction under 28 U.S.C. §1257 to review the decision of the Minnesota Supreme Court reversing Orville Berndt's conviction on grounds of evidentiary insufficiency.

Crucial to the exercise of our certiorari jurisdiction is whether the controlling issue in the state court case is a federal issue But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state



decision will be reviewed. First, the federal question must be a substantial question. Second, the federal question must have been properly raised in the state courts. . . . Third, even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law.

Justice Brennan, State Court Decisions and the Supreme Court, 31 Penn. Bar Assn. Q. 393, 399-400 (1960) (emphasis added).

Considerations affecting the grant of certiorari in cases coming from state courts especially militate against review in this case. The decision below presents no federal question. No federal question was framed or raised by Petitioner in the state court proceedings. No federal question was presented to the Supreme Court of Minnesota in the proceedings below. No federal question was considered or decided by the Minnesota Supreme Court in the prior proceedings. Rather, the



decision below rests completely upon adequate and independent state grounds. No right, title, privilege, or immunity of the State of Minnesota is implicated by this decision. Petitioner failed to draft her jurisdictional statement in compliance with Rule 21.1(h). In addition, Petitioner's appeal is barred by the Double Jeopardy Clause. Finally, reversals for evidentiary insufficiency, based entirely upon adequate and independent state grounds, are matters of state law and are not reviewable by this Court.

A. No Federal Question Was Framed,
Raised, Or Presented By Petitioner
Or Considered By The Court In The
Proceedings Below.

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication



that the federal question was adequately presented in the state system." Webb v. Webb, 451 U.S. 493, 497 (1981) (citations omitted).

Petitioner contends that "[t]he question presented herein is 'whether a state appellate court may reverse a criminal conviction on the ground of evidentiary insufficiency, thereby invoking the federal constitution's double jeopardy clause bar against retrial, where the evidence is legally sufficient to sustain the conviction'" Petitioner's Brief at 19. The question is subsequently rephrased to read: "The issue before this Court, therefore, is whether a state appellate court may label a legally sufficient conviction as insufficient, thereby invoking the federal constitution's double jeopardy bar against retrial." Id. at 23. The result of such a ruling,



according to Petitioner is to extend "the meaning of 'evidentiary insufficiency' and 'double jeopardy' beyond the scope of the fifth and fourteenth amendments."

Id. at 19. In essence, Petitioner contends that a garden variety reversal for evidentiary insufficiency based entirely upon adequate and independent grounds constitutes a federal question, thereby invoking this Court's jurisdiction.

Notwithstanding the remarkable bootstrapping Petitioner engages in to fashion this specious "federal question," it is abundantly clear that no federal question constructed along these (or any other) lines was ever framed, raised, or presented, explicitly or by implication, to the Minnesota Supreme Court in the proceedings below. A review of the table of contents for the prosecution's Petition For Rehearing to the Minnesota



Supreme Court demonstrates Petitioner's failure to raise a federal question below. The issues raised by Petitioner below are as follows:

• • •

III.

IN HOLDING THAT THE EVIDENCE WAS INSUFFICIENT, THIS COURT OVERLOOKED AND MISCONCEIVED MATERIAL EVIDENCE IN THE CASE.

IV.

EXAMINATION OF THE MATERIAL EVIDENCE THAT WAS OVERLOOKED AND MISCONCEIVED BY THIS COURT MAKES CLEAR THAT THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO THE VERDICT WAS SUFFICIENT TO SUSTAIN THE JURY'S VERDICTS.

V.

BECAUSE THE EVIDENCE WAS TECHNICALLY SUFFICIENT TO SUSTAIN THE JURY'S VERDICTS, THE INTERESTS OF JUSTICE REQUIRE EITHER THAT THE VERDICTS BE REINSTATED OR THAT THE CASE BE REMANDED FOR TRIAL.

Petition For Rehearing, p. i.

The prosecution does assert in their petition for rehearing below that the double jeopardy clause permits the court



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to rehear and remand the case for retrial. Petition For Rehearing, pp. 45,49. However, both contentions are subsidiary and supplemental to the prosecution's main argument that "[b]ecause the evidence was technically sufficient to sustain the jury's verdicts, the interests of justice require that the verdicts be reinstated or that the case be remanded for trial."

Id. at 45 (emphasis added).²

The main premise of the prosecution's argument to the Minnesota Supreme Court

2 The State's contention that a new trial would not result in a retrying of the same evidence can only be seen as a strategy calculated to allay any potential concern the lower court may have over defendant's rights under the federal Double Jeopardy Clause. Indeed, the State phrased this issue to read: "[r]emanding this case for retrial is permissible under the double jeopardy clause." Petition for Rehearing, p. 45. Petitioner now claims that the court's ruling below "will bar retrial unless it is (footnote continued next page)



was simply that the evidence was sufficient. Id. at 49. Nowhere in their petition for rehearing does the State suggest or imply that reversal is mandated because of the presence of federal issues. In fact, they went to great lengths to assure the Court that a reinstatement of the verdict or remand for retrial would not run afoul of the Double Jeopardy Clause. But merely arguing that something is not prohibited or is permissive is not the equivalent of an assertion that it is required or compelled. The case was presented to the

reversed." Petitioner's Brief at 23 (emphasis in original). That such a tactic could now give rise to a federal question is untenable. The Petitioner did not argue that the federal Double Jeopardy Clause required the Minnesota Supreme Court to sustain the trial court. As noted above, their only contention was that the evidence was sufficient to convict. This argument does not rest upon the Federal Constitution or prior decisions of this Court.

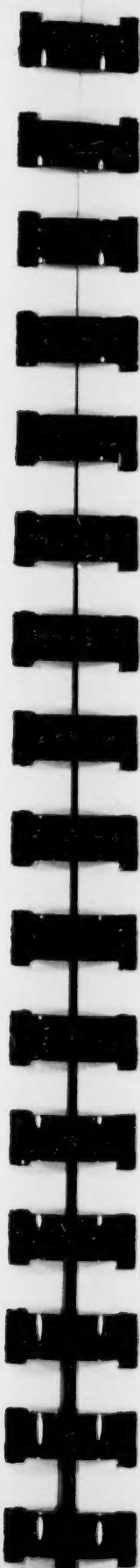


Minnesota Supreme Court solely on the grounds of whether the evidence was sufficient to convict.³ It is "not enough [to acquire jurisdiction] that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature." Whitney v. California, 274 U.S. 357, 362 (1927); Dewey v. Des Moines, 173 U.S. 193, 199 (1899). "The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

3 A recent case decided by the Minnesota Supreme Court shows that the Court is very sensitive to the type of constitutional issues petitioner claims are present in this case. See, State v. Gurske, ___ N.W.2d ___, slip. op. CX-86-777 (Minn. 1986). The holding in Gurske demonstrates that the Minnesota Supreme Court recognizes and decides federal issues when they arise.



The dearth of any federal question below is emphasized by Petitioner's failure to satisfy this Court's requirements as set forth in Rule 21.1(h). Under Rule 21.1(h), Petitioner's jurisdictional statement must "specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them, and the way in which they were passed upon by the court" Petitioner fails to comply with these requirements. Nowhere does it appear in Petitioner's Statement of the Case where the federal question was raised, how it was raised, or how it was decided. The Petitioner simply never argued that the Minnesota Supreme Court's failure to reverse their evidentiary ruling would implicate federal concerns.



Indeed, they argued just the opposite. Their contention below was that the Federal Double Jeopardy Clause would not be implicated by retrial or reinstatement of the verdict. They did not argue that remand or reinstatement was required by Federal constitutional principles.

Petitioner also alleges that the court below erred in their use of a circumstantial evidence standard "more stringent than that required by the due process test." Petitioner's Brief at 24. Putting aside the merits of this claim, it is absolutely clear that Petitioner also failed to raise this issue below. Quite the contrary, in their Petition For Rehearing below, the State reminded the Court it had repeatedly held that:

The circumstantial evidence in a criminal case is entitled to as much weight as any other kind of evidence so long as the circumstances proved are "consistent with the hypothesis that the accused is guilty and



inconsistent with any rational hypothesis except that of his guilt.

Id. at 23.4

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- 4 The State cites State v. Morgan, 290 Minn. 558, 561, 188 N.W.2d 917, 919 (1971), and State v. Jackson, 326 N.W.2d 663, 665 (Minn. 1982). This was the very evidentiary standard and supporting case law which appears in the decision below. Most importantly however, it is the very same standard which the State now says is a departure from the court's "own traditional evidentiary test." Petitioner's Brief at 24. It is incongruous for petitioner to urge one argument to the Minnesota Supreme Court below and subsequently urge the opposite argument before this Court. It is patently ridiculous to suggest, based upon what they actually argued and pointed out to the court below, that a federal issue was raised which condemns as somehow inconsistent with federal due process a standard of circumstantial evidence which petitioner itself urged upon the court below as controlling state law. In essence, petitioner argued below that such law was binding upon the court insofar as its considerations of evidentiary insufficiency were involved and now demands a reversal arguing this very same standard is precluded by federal constitutional law. This issue logically cannot have been raised below because petitioner was arguing in favor of its use by, and binding effect on, the Minnesota Supreme Court.



The crucial consideration is whether the record as a whole demonstrates, expressly or by implication, that the federal question was "brought to the attention of the state court with fair precision and in due time." New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

At the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure . . . that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

Webb v. Webb, 451 U.S. 493, 501 (1981).

The Petitioner fails these tests utterly and abjectly as shown by Respondent's arguments, supra.

Additional proof illustrating



Petitioner's failure to raise a federal question below is available in the text of the court's opinion. Petitioner concedes that the opinion below makes no reference to federal issues.

Petitioner's Brief at 19. A brief review of the opinion itself emphatically and conclusively proves that the sole basis for their ruling was evidentiary insufficiency. The court held that the prosecution's "entire case was bottomed on mere speculation or upon hypothesized 'facts' not in evidence About all the state produced to show appellant was the culprit was suspicion unsupported by facts." State v. Berndt, 392 N.W.2d 876, 881 (Minn. 1986). Clearly, the court was absolutely unconcerned with, and indeed totally unaware of, any issues of federal importance.

Moreover, the entire opinion rests upon adequate and independent state



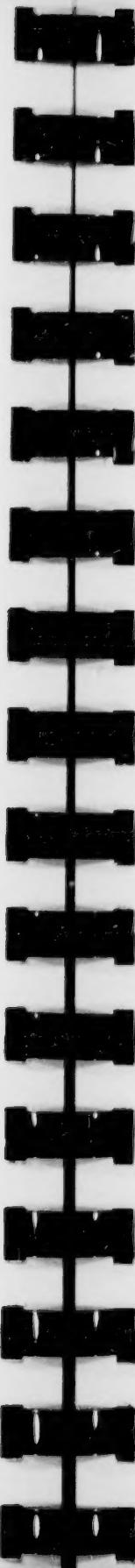
grounds. The only references to controlling legal principles or prior judicial decisions involve Minnesota case law pertaining to evidentiary issues. Not one word in the opinion refers to any issue not governed by Minnesota law. No federal law of any kind is discussed, cited, or otherwise implicated in the court's opinion. A similar situation confronted this Court in Webb v. Webb.

In that case, the Court stated:

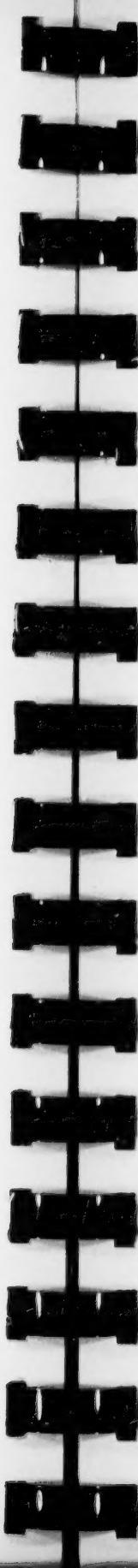
We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Id. at 496 (footnotes omitted).

Petitioner has not met this burden.



Where, as here, the judgment rests upon an adequate and independent state ground, namely, that the evidence was insufficient, the Supreme Court has no jurisdiction to review the case. Chief Justice Rehnquist, speaking for the majority in Wainwright v. Sykes, stated that "[a]s to the role of adequate and independent state grounds, it is a well-established principle of Federalism that a state decision resting upon an adequate foundation of state substantive law is immune from review in the federal courts." 433 U.S. 72, 81 (1977). Such garden variety state court judgments "not only cannot be overturned by, [but] indeed, are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such cases." Justice Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489,



501 (1977). The rationale

is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudicate federal rights.

Herb v. Pitcairn, 324 U.S. 117, 126

(1945).

Principles of comity in our federal system require:

"a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways."

Younger v. Harris, 401 U.S. 37, 44

(1971).

In sum, when "there can be no pretense that the [state] Court adopted



its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong." Nickel v. Cole, 256 U.S. 222, 225 (1921); Wolfe v. North Carolina, 364 U.S. 177, 195 (1960)." If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

Michigan v. Long, 463 U.S. 1032, 1041 (1983).

Petitioner also asserts that "the Minnesota Supreme Court's reversal was based on a standard more stringent than that required by the due process test



. . ." Petitioner's Brief at 24.⁵
Petitioner erroneously claims that this standard of review was "explicitly rejected" by Jackson v. Virginia. But this too, is misleading. There is no language in Jackson even remotely intimating that this standard of circumstantial evidence is unconstitutional or that the states are forbidden to use it in their tribunals.⁶

-
- 5 The following circumstantial evidence standard was cited by the court below as applicable under Minnesota Law:

The circumstantial evidence in a criminal case is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt.

State v. Berndt, 392 N.W.2d 876, 880 (Minn. 1986).

- 6 Petitioner's reference to Holland v. U.S., 348 U.S. 121, 139-40 (1954), is (footnote continued next page)



Significantly, the Jackson standard is to be applied "with explicit reference to the substantive elements of the criminal offense as defined by state law."

Jackson v. Virginia, 443 U.S. at 324 n.

16. This also includes reference to state evidentiary law. Moore v. Duckworth, 443 U.S. 713 (1979). See also, Scott v. Perini, 662 F.2d 428 (6th Cir. 1981), cert. denied 456 U.S. 909 (1982).⁷ Thus, it is absolutely clear that the Minnesota standard pertaining to circumstantial evidence is

similarly inapposite. The Court did not say that this standard was not permitted by federal law for use in state judiciaries.

7 In Scott v. Perini, the Court of Appeals noted in passing that Ohio still adhered to the same standard of circumstantial evidence as is at issue in this case. No mention is made by the court that the federal standard is inconsistent with the Ohio version. The standards simply coexist as part and parcel of our federal system.



purely a matter of state law which presents no conflict with federal law in the context of this case.⁸ In addition, it is apparent that this standard was not the dispositive factor in the court's decision to reverse respondent's conviction. Immediately following their recitation of the standard, the court states that "[e]xcept for the fact that appellant was physically present in his home when the fire started, there exist no other circumstances consistent with the state's hypothesis of guilt." State v. Berndt, 392 N.W.2d at 880 (emphasis added). In other words, even though the

8 A great deal has been written concerning the relative weight to be assigned to direct and circumstantial evidence. See I Wigmore on Evidence §26 (3rd ed. 1940). However that debate is eventually resolved, it is clear that a state may adopt an evidentiary standard (as Minnesota has done) which merely distinguishes between circumstantial and direct evidence.



court also found that "all of the circumstances [were] consistent with a rational hypothesis other than guilt," the state simply failed to prove that the circumstances were consistent with guilt. Id. In view of the foregoing, Petitioner can hardly assert that the use of this standard imposed an impermissible burden upon the prosecution.

B. The Decision Below Presents No Federal Question.

The decision below presents no federal question for review by this Court simply because Petitioner has no federal "title, right, privilege or immunity" which has been abridged by the Minnesota Supreme Court's ruling.

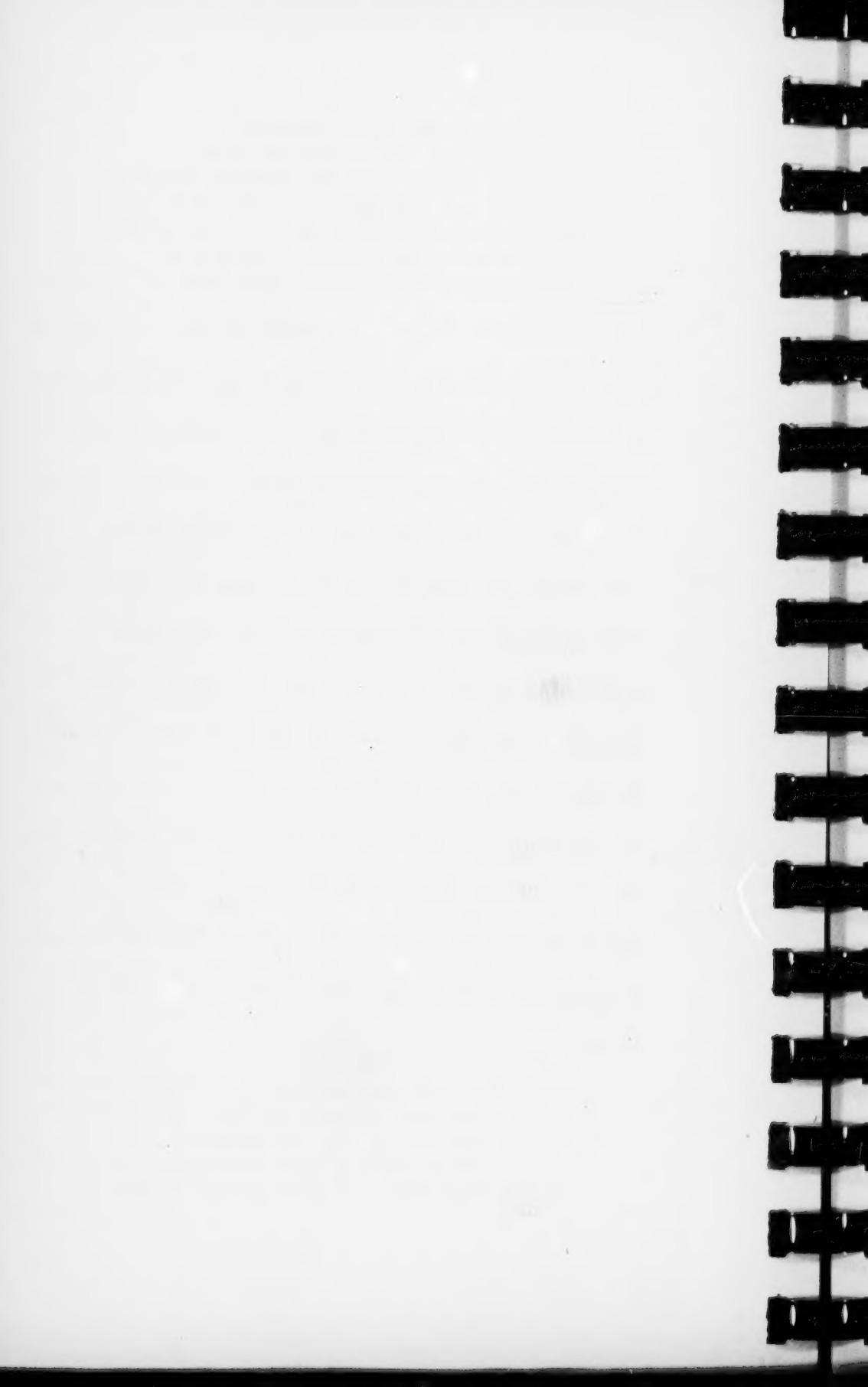
Petitioner erroneously claims that a federal question is presented by virtue of this Court's holding in Jackson v. Virginia, 443 U.S. 307, reh. denied, 444 U.S. 890 (1979). Jackson held that



A challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilty beyond a reasonable doubt states a federal constitutional claim.

Id. at 322. This language does not stand for the proposition that a prosecutor has a right under the federal constitution to challenge an acquittal based solely upon grounds of evidentiary insufficiency. The federal right in Jackson belonged to the defendant who was appealing his conviction on grounds of evidentiary insufficiency. This does not mean that a prosecutor has a federal right to appeal an acquittal grounded solely on state law by claiming that the evidence was sufficient to convict. This Court noted in U.S. v. Wilson, 420 U.S. 332 (1975), that:

[a] system permitting review of all claimed legal errors would have symmetry to recommend it and would avoid the release of some defendants who have bene-



fited from instructions or evidentiary rulings that are unduly favorable to them. But we have rejected this position in the past, and we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal.

Id. at 352.

This Court in Jackson did not address, and was totally unconcerned with, the ability of the prosecution in a state criminal case to appeal a ruling from a state high court in favor of a defendant. Rather, the opinion demonstrates that it was the potential for state intrusion upon the federal constitutional rights of the defendant which commanded their attention.⁹

9 Although state appellate review undoubtedly will serve in the vast majority of cases to vindicate the due process protection that follows from Winship . . . [i]t is the occasional abuse that the federal writ of habeas corpus stands ready to correct." Jackson v. Virginia, 443 U.S. at 322.



It is this concern which provided the basis for the presence of a federal question in Jackson. As stated by Mr. Chief Justice Rehnquist in U.S. v. Inadi, ___ U.S. ___, 106 S.Ct. 1121 (1986), a case "must be read consistently with the question it answered, the authority it cited, and its own facts." Id. at 1126. Petitioner's misuse of Jackson as support for the existence of a federal question in this case is erroneous, disrespectful, and misleading.¹⁰

10 Petitioner also attempts to mislead the Court in stating that the "propriety of a state court ruling on the sufficiency of the evidence in a criminal case is a proper matter for federal appellate review." Petitioner's Brief at 28. Five cases are cited for this proposition. However, none of the authority cited supports Petitioner's contention in this case. U.S. v. Wilson and U.S. v. DiFrancesco, are inapposite as they do not involve review of rulings of evidentiary insufficiency. Rojas, DeGarces and Steed are not dispositive as they all (footnote continued next page)



C. The State Of Minnesota Waived Any Objection To Alleged Nondelivery Of Trial Exhibits By Choosing To Remain Silent In Response To The Trial Court Clerk's List Of Exhibits Transmitted To The Supreme Court And By Not Personally Ensuring Such Delivery.

Minnesota law is clear. A party who wishes to utilize a portion of the record " . . . bears the burden of taking the necessary steps to have the clerk of the trial court forward the original file to the Supreme Court." Holtberg v. Bommersbach, 235 Minn. 553, 51 N.W.2d 586, 588 (1952). Even though the trial court clerk has a duty to transmit the record, that duty does not extend to large or heavy items:

A party shall make advance arrangements with the clerk for

involved governmental appeals in federal court predicated upon 18 U.S.C. §3731, which has been held not to apply to state court rulings. See People of the Territory of Guam v. Okada, 694 F.2d 565, 567 (9th Cir. 1982), cert. denied 469 U.S. 1021 (1984).



the delivery of bulky or
weighty exhibits and for the
cost of transporting them to
and from the appellate courts.

Rule 111.01, Minn. R. Civ. App. Proc.

On May 14, 1985, the clerk of the trial court prepared the list of exhibits delivered to the Minnesota Supreme Court and sent ". . . a copy of this list to all parties." Rule 111.01, Minn. R. Civ. App. Proc. Regardless of whether this rule implicates a federal issue, the State, nonetheless, has a legitimate interest in its own procedural rules.

Henry v. Mississippi, 379 U.S. 443 (1965), reh. denied 380 U.S. 926 (1965). The list clearly shows what was delivered. Perhaps counsel for the State thought it was better that the Supreme Court not receive some exhibits. In any event, counsel chose to remain silent. The floor plans were included in Appellant's Brief to the Minnesota Supreme Court. The State has waived any



possible objection by waiting until after the Minnesota Supreme Court decision to raise any objection.

II. PETITIONER'S APPEAL IS BARRED BY THE DOUBLE JEOPARDY CLAUSE.

Even assuming, arguendo, the presence of a federal question, petitioner's appeal to this Court is barred by the federal constitution's Double Jeopardy Clause. An order or judgment that evidence is legally insufficient to sustain a verdict of guilt amounts to an acquittal for purposes of the Double Jeopardy Clause. See United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). If a trial court enters a judgment or order constituting an acquittal, an appeal by the prosecution is barred by the Double Jeopardy Clause not only when there is potential for a second trial, but also if reversal would result in further



proceedings for resolution of factual issues going to the elements of the charged crime. See Martin Linen, supra; Smalis v. Pennsylvania, ___ U.S. ___, 106 S.Ct. 1745 (1986) (dicta).

These rulings preclude this appeal by Petitioner since it is apparent that such an appeal, if successful, would necessarily be followed by further proceedings to resolve factual issues germane to elements of the crime charged.¹¹ Because further proceedings evaluating this evidence would be required upon remand, the Double Jeopardy

¹¹ Indeed, Petitioner's Brief argues as much. In their Statement of the Case, Petitioner points out that "[t]he prosecution further informed the Minnesota Supreme Court that a new trial would not result in a retrying of the same evidence since new evidence supporting respondent's guilt had come to light since his original conviction." Petitioner's Brief at 17.



Clause bars this appeal.¹² As stated by Chief Justice Rehnquist in *U.S. v. Jenkins*, 420 U.S. 358, 370 (1975),

[i]t is enough for the purposes of the Double Jeopardy Clause . . . that further proceedings of some sort, devoted to the resolution of factual issues . . . would have been required upon reversal and remand To subject [defendant] to any further such proceedings at this stage would violate the Double Jeopardy Clause.

Finally, it is not clear that the Supreme Court would permit review of state court rulings based upon evidentiary insufficiency irrespective of whether additional proceedings would be required. Verdicts of acquittal based upon evidentiary insufficiency have occupied a special place in the decisions

12 There is no authority to review state court decisions based upon reversals for evidentiary insufficiency. All cases cited by petitioner for the proposition that their appeal is not barred are federal cases arising under 18 U.S.C. §3731.



of this Court. This concern is especially visible in Burks v. U.S., 437 U.S. 1 (1978). In Burks, the Court distinguished between reversals due to trial error and those due to evidentiary insufficiency. The Court observed that:

"reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case.

. . . [T]he same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not even have been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not have



returned a verdict of guilty." (Emphasis added).

Id. at 16. Justice Brennan, dissenting in U.S. v. Difrancesco, observed that "[t]he Court, of course, acknowledges that verdicts of acquittal are not appealable." 449 U.S. 117, 143 n. 10 (1980).

Further, if the Court did decide this question in the affirmative, it is unlikely it would extend the scope of such a decision to include appeals brought in federal court by state prosecuting entities challenging decisions rendered by state tribunals acquitting defendants on grounds of evidentiary insufficiency.

The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to



live in a continuing state of anxiety and insecurity . . ."

Green v. U.S., 355 U.S. 184, 187 (1957).

To sanction appeals by state prosecuting entities from state court rulings of the type involved here would result in giving the state yet one more opportunity to convict a defendant. Even if such a result would be permissible within the federal system, it surely would be inappropriate where this Court is asked to review a state court judgment resting entirely upon independent and adequate state grounds.



CONCLUSION

The State of Minnesota is unhappy with the unanimous decision of the Minnesota Supreme Court. However, unhappiness is not sufficient to vest jurisdiction in this Court. The State argues that Minnesota's standard regarding circumstantial evidence implicates a federal issue. The State never advanced this argument below. Indeed, the State accepted this standard and argued that the evidence was sufficient. However, the Minnesota Supreme Court's decision did not turn on this standard. The Court below reversed because the case "was bottomed on mere speculation or upon hypothesized 'facts' not in evidence." Berndt, at 880.

The State of Minnesota has also engaged in other misrepresentations in these proceedings. The State assured the



Minnesota Supreme Court that retrial was permissible under the Double Jeopardy Clause. The State now says retrial is prohibited. In the lower court, the State introduced evidence outside the record and not presented at trial (an admission that the evidence was insufficient to sustain the convictions). The State argued this was done in good faith to show that a retrial would include additional evidence. Now that the State believes retrial is prohibited, what good faith argument does the State advance to include material that is dehors the record? It can only be in an attempt to improperly influence this Court.

In the Petition For Rehearing below, the State did not raise or cite any federal issue involved in the decision. The Minnesota Supreme Court's decision did not rest on or construe any federal



issue. This case turns solely on its own facts and upon adequate and independent state grounds. It affects only the parties involved, and therefore has no precedential value.

Finally, the State argues the Double Jeopardy Clause through the Fourteenth Amendment is implicated. However, the "right, title, privilege, or immunity" of the Double Jeopardy Clause applies to "persons", i.e. defendants. The Double Jeopardy Clause is a prohibition on the State. Consequently, no such right, title, privilege or immunity of the State is implicated. Accordingly, this Court should decline review.



Respondent respectfully requests
that this Court decline review.

Respectfully submitted,

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DATED: this 24th day of November, 1986.

No. 86-704

Supreme Court, U.S.

FILED

NOV 26 1986

JOSEPH F. SPANOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

RESPONDENT'S APPENDIX,
PART I

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C2-84-1661

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,

Plaintiff,
vs.

ORVILLE BERNDT, JR.,

Defendant.

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STATEMENT OF THE ISSUES

I.

DID THE FAILURE OF THE STATE TO
PROVIDE RESULTS OF SCIENTIFIC
TESTS REQUESTED BY THE DEFENSE
THAT WERE CRUCIAL TO THE
PRESENTATION OF THE DEFENSE
REQUIRE REVERSAL AND A NEW
TRIAL?

TRIAL COURT HELD: IN THE
NEGATIVE

II.

SHOULD EVIDENCE TAKEN FROM SKIP
BERNDT'S HOME PURSUANT TO A
WARRANTLESS SEARCH BE
SUPPRESSED?

TRIAL COURT HELD: IN THE
NEGATIVE

III.

DID THE INTRODUCTION OF THE BAD
CHARACTER OF SKIP BERNDT, THE
DELAY IN CHARGING, THE REQUEST
BY THE STATE OF THE JURY TO
SPECULATE, AND THE IMPROPER
FINAL ARGUMENT BY THE STATE,
PREJUDICE SKIP BERNDT AND DENY
HIM A FAIR TRIAL?

TRIAL COURT HELD: IN THE
NEGATIVE



IV.

WAS THE EVIDENCE SUFFICIENT TO
SUSTAIN A VERDICT OF GUILTY OF
MURDER IN THE FIRST DEGREE?

TRIAL COURT HELD: IN THE
AFFIRMATIVE

PROCEDURAL HISTORY

- August 21, 1981 At 2:56 a.m., police and fire fighters respond to a fire at Skip Berndt's home.
- August 21, 1981 At 7:00 a.m., Skip Berndt questioned by police at the Brooklyn Center Police Department.
- August 27, 1981 Skip Berndt interviewed at Brooklyn Center Police Station.
- October 6, 1981 Skip Berndt questioned by police; told case with Hennepin County Attorney and would be charged.
- August 17, 1982 Hennepin County Attorney presented its case against Skip Berndt to a Hennepin County Grand Jury.
- August 17, 1982 Skip Berndt was indicted on eight counts of First Degree Murder.
- August 18, 1982 Skip Berndt was arrested.



August 19, 1982 Skip Berndt made his first appearance in court. Bail was set at \$150,000 by the Honorable Chester Durda.

September 2, 1982 Bail reduced to \$35,000 by the Honorable Chester Durda.

September 3, 1982 Skip Berndt posted \$35,000 bond.

November 10, 1982 Skip Berndt moved the Court to dismiss the indictment filed against him.

November 22, 1982 Motion to dismiss was denied by the Honorable Eugene Minenko.

March 4, 1983 The Honorable Doris Huspeni assigned to case.

October 3, 1983 Trial begins.

October 5, 1983 Court denies motions to suppress.

November 12, 1983 Skip Berndt was found guilty of eight counts of First Degree Murder.



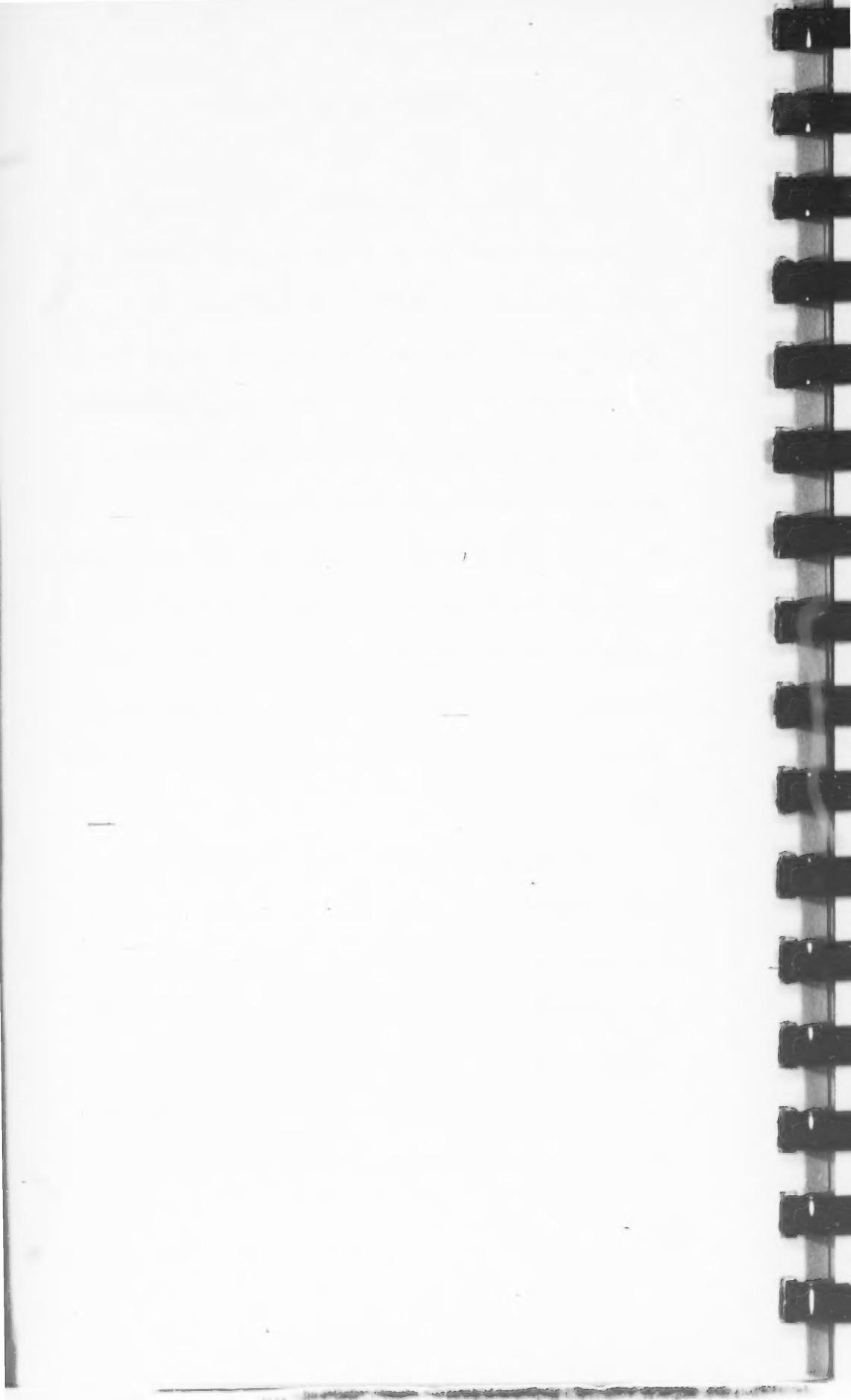
- November 12, 1983 The Honorable Doris Huspeni sentenced Skip Berndt to life imprisonment on four counts of First Degree Murder. The Court ordered the sentences served concurrently. The Court did not sentence on the remaining four counts pursuant to Minn. Stat. §609.035.
- November 22, 1983 Skip Berndt moved the Court for a new trial or judgment of acquittal because the State had not complied with the Discovery Requirements of Rule 9, Minnesota Rules of Criminal Procedure.
- March 21, 1984 Testimony was taken pursuant to Skip Berndt's New Trial Motion.
- August 1, 1984 The Honorable Doris Huspeni denied Skip Berndt's Motion for New Trial or Judgement of Acquittal.
- September 13, 1984 Notice of Appeal to the Supreme Court of the State of Minnesota filed.



STATEMENT OF FACTS

On August 20, 1981, Skip Berndt returned home from work at approximately 6:00 p.m. (T. 1119). He worked at Continental Baking Company as a sales supervisor (T. 1109). As Skip changed his clothes, his wife Brenda cooked a pizza for the children for supper. Because the smoke alarms in the townhouse complex were overly sensitive and the exhaust ventilation was very poor, the residents frequently disconnected them when using the ovens (T. 282). Skip did this (T. 1119).

Skip and Brenda then left to meet with their automobile insurance carrier so that a used car they had recently purchased could be properly insured (T. 1120). After taking care of the insurance, Brenda and Skip had a night out with friends to celebrate the car



purchase. After visiting two bars, Brenda and Skip ended up at the Earle Brown Bowl in Brooklyn Center which was usual for them because they knew many people there. They arrived about 10:30 p.m. and stayed until 1:00 a.m. While there, they drank and visited (T. 1121-1124). Everyone described Skip and Brenda as having a good time and saw no problems, difficulties, fights, etc. (T. 636, 646, 649, 660, 678, 953).

They left the Earle Brown Bowl together and arrived home about 1:10 a.m. (T. 1124). Skip hadn't eaten supper that evening so he went into the kitchen and fixed something to eat (T. 1125). He laid down on the couch and watched television (T. 1126). Skip fell asleep (T. 1128), he woke up, he wasn't sure if it was Brenda who woke him up or something else (T. 1130, 1131), but he saw flames by the dining room window



(T. 1130). At this time, the house was full of smoke and extremely hot. Skip was confused and panicked. He saw Brenda heading towards the kitchen area and he ran out the "front door" (T. 1130). As he left his home, the house burst into flames (T. 1132).

As Skip came out the front door, his next-door neighbor, Charles Catron, came out his door (T. 255). Skip started screaming for the fire department (T. 1135). Mr. Catron had come out because his wife woke him and told him of the fire next door (T. 242). Mr. Catron crawled into Skip's house, over an area the State contended gasoline was present (T. 548), and got into the kitchen. He saw Brenda's feet but could not see the rest of her because the smoke was so heavy. He burned his finger on the metal strip that held the carpet down at the



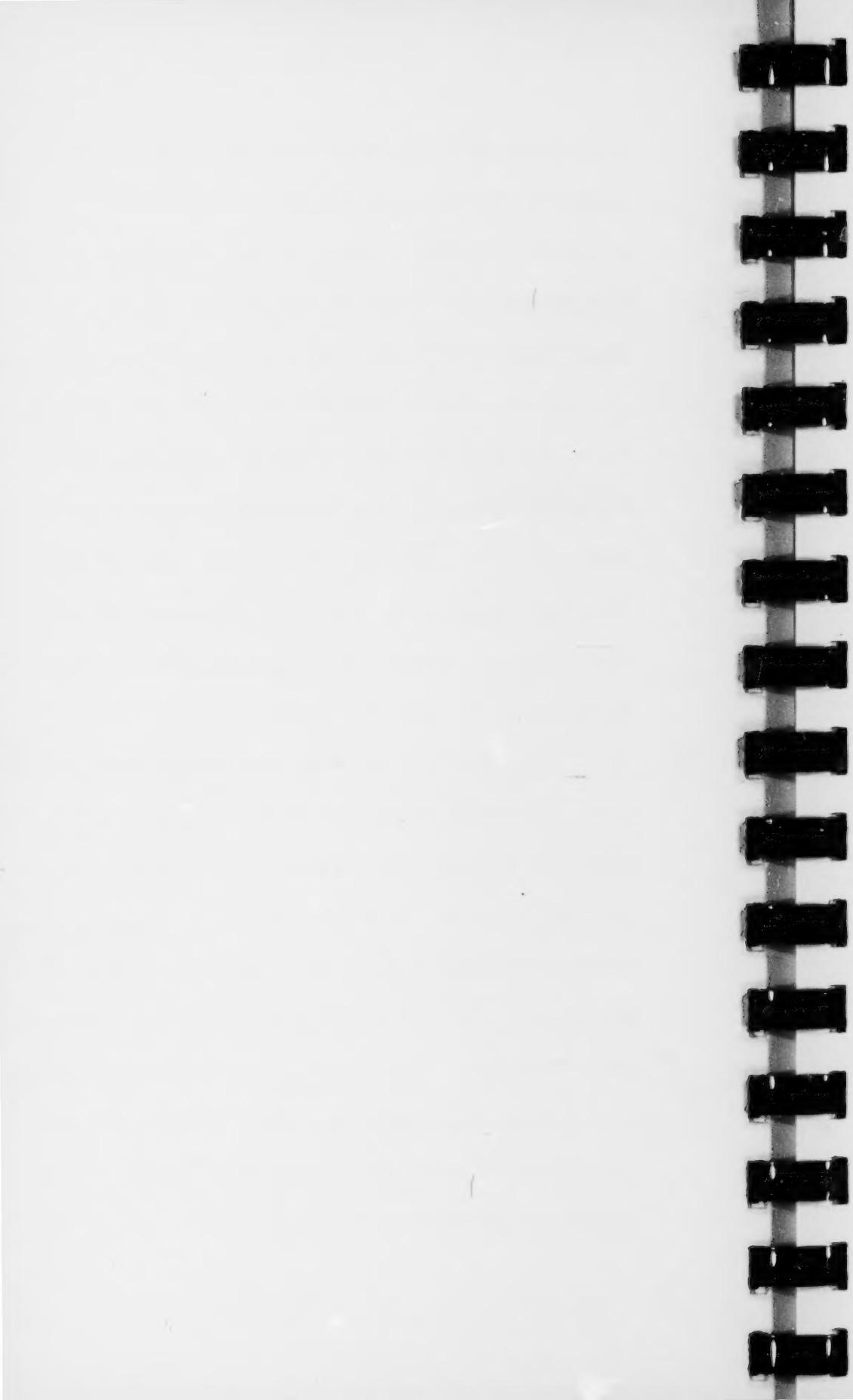
line between the dining room and kitchen (T. 257-260) (See Appendix A).

When the police arrived, Skip was trying to put the fire out by using a garden hose (T. 62-63). Officer Robert Adams of the Brooklyn Center Police Department was the first on the scene. He reported that the second story of the home was not afire (T. 61, 82). Consequently, he spent some time looking for a ladder, including kicking in a door to the caretaker's maintenance equipment garage, to rescue anyone upstairs (T. 63). He found no ladder. Officer Adams kept calling the fire department to tell them how serious the fire was (T. 61-62). The fire department arrived. Fire personnel said they arrived five to six minutes after they were notified (T. 91). However, the neighbors who reported the fire said that the fire fighters did not arrive until ten to twenty minutes after



the fire was discovered (T. 229, 283). Roxanne Berg, one of the neighbors present at the scene, specifically disputed the five minutes the fire department claimed it took them to arrive (T. 229). As a result of her criticism, Fire Marshall Jerry Pedlar accused Ms. Berg of making the fire department look bad (T. 231, 232). The fire was under control approximately 35 minutes after the fire fighters started fighting the fire (O.H.T. 46, T. 728).

Because of Skip's hysteria and his interference with the fire fighters, Officer Adams took Skip to Skip's sister's home in Maple Grove. In the car ride, Officer Adams detected no odor of gasoline (T. 77). While Skip was outside watching his home burn, a neighbor hugged him. She detected no odor of gasoline (T. 251). Officer Adams was later instructed to bring Skip Berndt back to



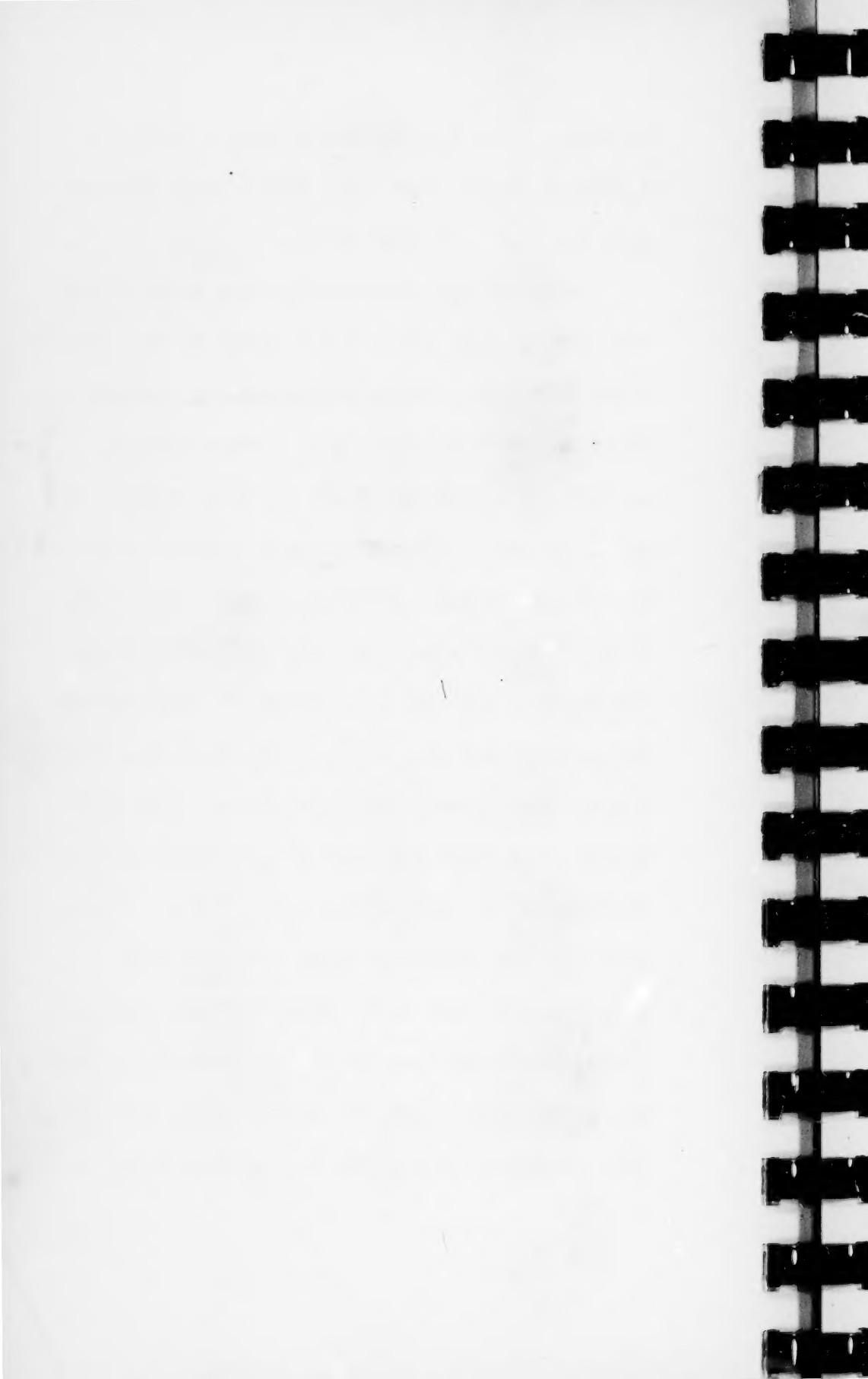
the Brooklyn Center Police Department for interrogation. Officer Adams was instructed that Berndt had no choice to refuse and that he was to be treated as a suspect (O.H.T. 16, 101). The Brooklyn Center Fire Marshall considered the fire an arson because of how much of the home was burning when the fire department arrived (T. 719).

Skip told the officers what happened that evening (T. 115-118). In the interview, Skip was wearing the same clothes he had on while at the scene (T. 969). The left side of his arms and face were singed (T. 1054). However, no one detected the odor of gasoline (T. 1055). Skip Berndt's clothes were not confiscated (T. 347). Skip was requested to and did consent to being taken to North Memorial Medical Center to draw blood for purposes of evaluating the alcohol content (T. 118-119). Brenda



Berndt, age 31, Richard Gage, age 14,
Michael Gage, age 10, and Corey Berndt,
age 4, died in the fire.

The arson investigators evaluated the scene for four days over a one-month time period. They immediately assumed that the fire to Skip's house was an arson, because so much of the house was on fire when they arrived. They referred to it as "rapid acceleration" (T. 719, 729). They also did not believe Skip could get out of his home in the manner he testified (T. 753). In searching the home, the investigators found low burn areas and trailerings which they believed indicated a "set fire" (T. 776). They cut out 26 samples they considered suspicious and sent them to the federal laboratory of the Alcohol, Tobacco, and Firearms division in Rockville, Maryland. The chemist analyzed the samples by means



of gas chromatography. He said he used the Purge and Trap method of analysis (T. 2158) (See Appendix D). Of the 26 suspicious samples he tested, he believed gasoline was present in only 5 (T. 546, 548, 549, 550, 551).

The defense demanded production of the "positive chromatograms", i.e., the chromatograms of the five samples the expert believed contained gasoline. The defense was provided five chromatograms, one for each sample. Throughout trial, the State's expert testified, and everyone assumed, that all of the positive chromatograms the State's expert ran were provided to defense counsel (T. 556, 1867, 1868). At the conclusion of the trial, the defense learned for the first time that the State's expert had run multiple tests on the same samples, had not provided the resulting chromatograms to the defense, and had

those in his laboratory in Maryland (T. 2161; M.T. 30).

At trial, the defense called two experts. Robert Davis, a forensic chemist and analytical chemist who does research work for the petroleum industry and has had over 25 years experience working with the gas chromatograph and gasoline (T. 1673-1677). He reviewed the five chromatograms submitted by the State's expert and concluded that they did not show the presence of gasoline. Rather, the chromatograms showed the presence of household hydrocarbons which appear within the gasoline spectrum (T. 1810, 1817, 1819, 1823, 1830).

The State's theory at trial was that Skip got drunk that evening, fought with his wife, poured five gallons of gasoline (T. 930) throughout his house, and lit it so he could be free of his family (T. 2257). To that end and over



counsel's objection, the State was allowed to introduce attempts at sexual advances made by Skip to other women, some even before his marriage to Brenda (T. 601, 636, 659). However, no evidence was presented that Brenda and Skip even argued that evening, let alone fought; no evidence was presented as to where the supposed five gallons of gasoline came from. The State also inferred that had Skip been innocent, he would not have run out of his house (T. 2225). However, no evidence on reaction to a panic situation was presented to the jury.

The State also theorized that Skip killed his family for profit. However, the State introduced no evidence that Skip knew what the financial results of a death to his wife would be. His wife worked for the State of Minnesota and was provided \$15,000 double indemnity insurance on her life. There was no



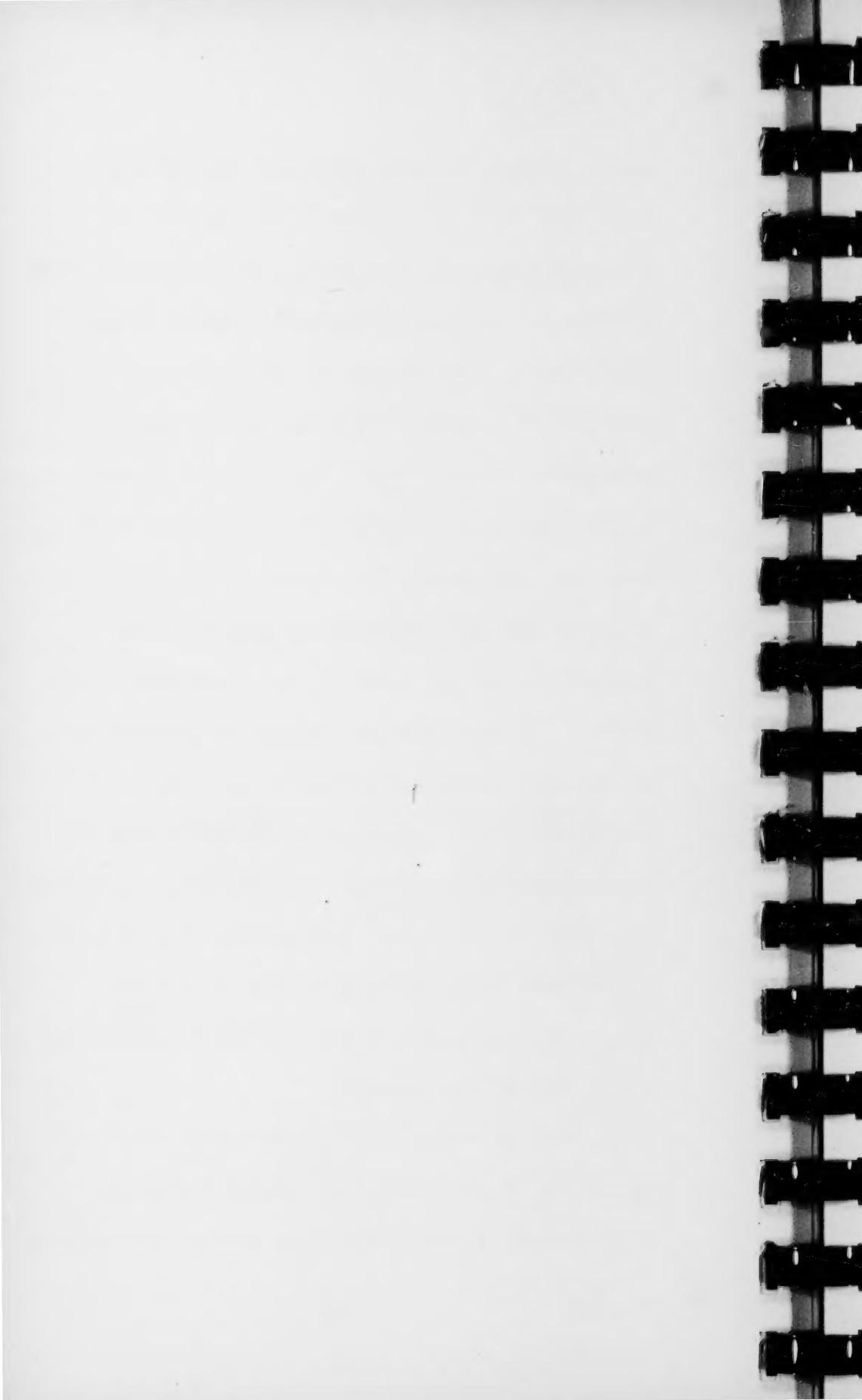
evidence Skip knew of the existence of the insurance policy. A beneficiary was not even named in the policy (T. 706) and the policy had been in force since 1978 (T. 707). The State also showed that when Skip and Brenda purchased their used car, it was financed through Community Credit which added a credit-life policy to the loan. The State's position was that this was another economic incentive for Skip to murder his wife. However, this was the normal business transaction Skip and Brenda did with that institution (T. 691), on loans in 1977, 1978, 1979, 1980 (T. 695). This evidence was presented by the defense, not the State. Skip was not even aware that the car loan was paid off with Brenda's death (T. 1244, 1254).

The evidence also presented by the defense showed that Skip had a loving father-son relationship with the three



boys. Even though Richard and Michael were not his biological children, he treated them as his own. He coached them in little league baseball, spent time with them, and acted as an ordinary family (T. 1114). Corey, Skip and Brenda's child, was inseparable from Skip. He was constantly with his dad even to the point of insisting he be allowed to sit on Skip's lap at the dinner table of family get togethers (T. 1255). There was no evidence presented as to why Skip would want to kill his children even though the State's expert found gasoline in two of the boys bedroom (T. 551). In final argument, the State contended that Skip put the gasoline there to trap his sons in the bedroom so they could not escape.

The experts testified that a gasoline fire exhibits instantaneous combustion throughout the structure which



was consistent with the State's position given the total involvement of the house in such a short time (T. 717, 935). Such a fire produces little smoke but great heat. However, carbon monoxide caused the children's death. The levels were very high, which indicated they did not die from breathing superheated air, but from breathing during a smoldering fire (T. 882).

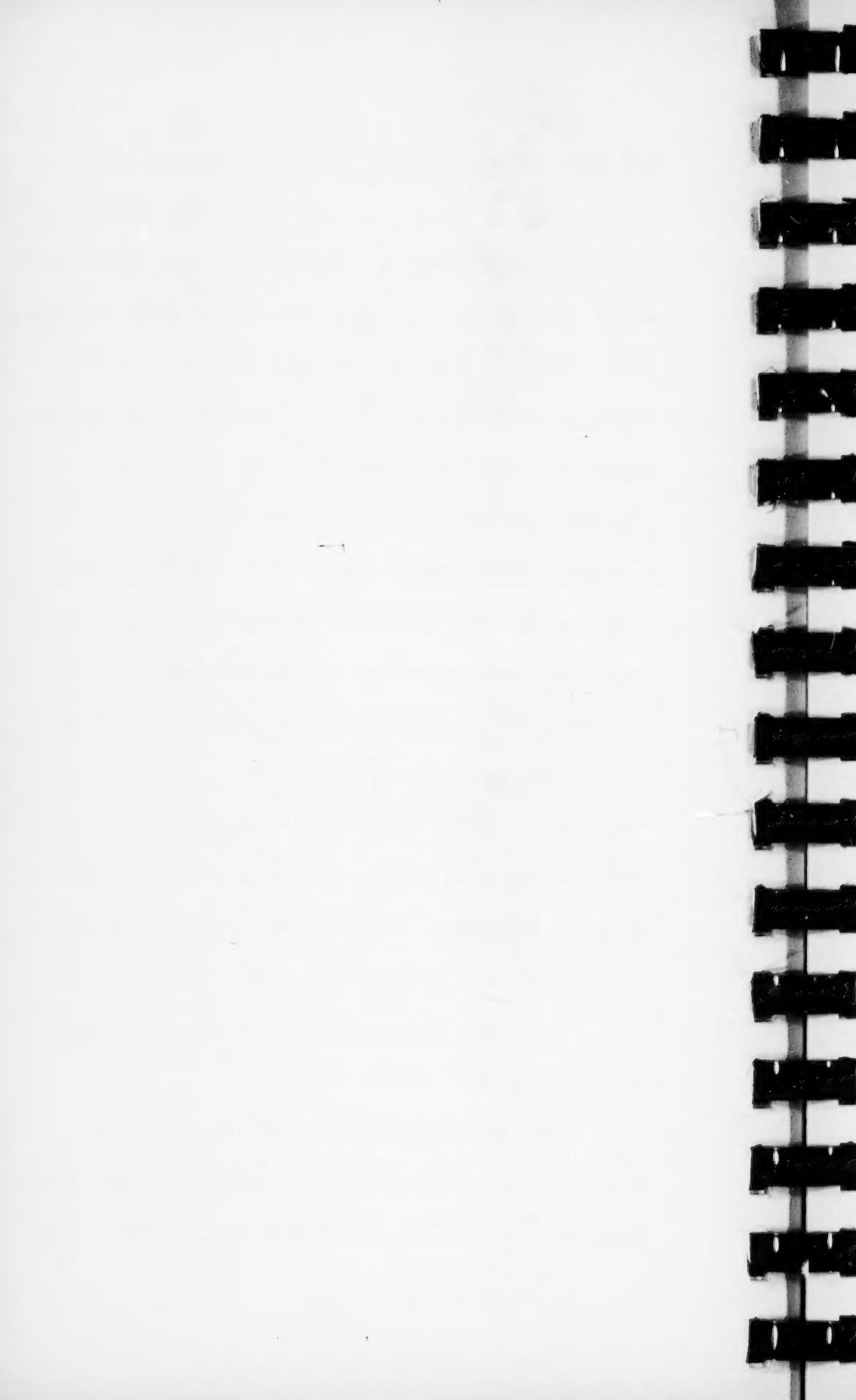
Brenda's carbon monoxide was low, below the level usually causing death (T. 885). Her death was attributed to breathing superheated air (T. 885). Her urinary bladder was very full, painfully so, and her blood alcohol was .25% (T. 886, 888). Skip thought he remembered Brenda walking into the dining room area and saying something like "Oh my God" just before he left the home (T. 1130). Her position and physiological evidence were consistent with that. At the time



of the fire, Skip's blood alcohol was predicted to be .12% or .13% (T. 892)

The defense's theory of the case was that the cause of the fire was accidental (T. 1399). The house was covered with synthetic carpeting. It was the defense experts' belief that in the fire, the carpet burned, melted, and became a liquid accelerant (T. 1320, 1339). To that end, the defense presented videotape experiments showing a carpet burning, turning to a liquid, dripping, and then continuing to burn (T. 1317). The testimony also was that the heaviest damage to the house was over the carpeted area. However, the defense experts could not view the scene and therefore could not find the cause of the fire with any certainty (T. 1303, 1364).

The witnesses testified that the fire department began spraying water from the pumper truck onto the house and



appeared to have the fire under control. However, the pumper truck ran out of water and the house reignited before the hose to the hydrant was connected (T. 146, 284). Defense experts testified that the marks that the fire investigators found on the floor, which were suspicious, could be caused by the pressure from the hoses blowing fire and debris around the room. This was especially possible because they ran out of water (T. 1304, 1340, 1342, 1343, 1345). The fire was attacked from an east-west direction. Thus, the east-west patterns of the burns would also be consistent with the marks that the arson investigators found suspicious (T. 1356). It was also defendant's position that as Skip lay on his living room couch, he was breathing oxygen depleted air causing disorientation and confusion. When he left the house, he opened the door, and a



flash back fire occurred (T. 1402). This is a fire situation that is mostly smoldering and very little flame. The fire consumes oxygen faster than it is being replaced. However, when a fresh supply of oxygen gets into the room, as when a door opens, the oxygen triggers the fire and the fire reignites. The defense expert also said a flash back fire was consistent with the burn characteristics (T. 1376, 1402-1406) and the observations of the neighbors (T. 1414-1415).

During the last day of trial, when the State's chemist testified in rebuttal, it was discovered for the first time that the chemist ran more than one chromatogram for each sample. This was contrary to his testimony and the assumptions each party made. The missing chromatograms were in Maryland (Motion Transcript, New Trial Motion papers,



Court Order for New Trial Motion;
Appendix C).

Skip Berndt was convicted of eight counts of First Degree Murder. He was sentenced to life imprisonment on four counts. It was ordered that the sentences be served concurrently (T. 2342).

In Berndt's motion for a new trial, Robert Davis again testified. This time he was able to testify that based on the missing chromatograms, the State's chemist did not perform a purge and trap analysis as that term is used in the scientific community (M.T. 27-28). Also, that the method of analysis contaminated the sample, therefore the result was unreliable (M.T. 40-43). Further, Mr. Davis testified that the manufacturers of the gas chromatographs did not accept or recognize the State's methodology (M.T. 26-28).

Finally, Mr. Davis discovered that in making the determination that a particular chromatogram showed the presence of gasoline, the State's expert did not view the entire chromatogram but only certain areas. This was improper from Mr. Davis' position because it disregarded retention time. Retention time is the time it takes a compound to appear on the chromatogram after it has been injected into the chromatograph (M.T. 15-18). There is computer assistance in plotting retention time which the State's chemist had access to but did not utilize (T. 2171-2172). Rather than utilizing the purge and trap method, the State's expert punched a number of holes in the bottoms of the cans and sucked room air through the sample containers. Robert Davis testified that the chromatograms he was given after trial show significant



differences, one from the other, for the same sample. This does not happen unless other substances contaminate the sample. Consequently, Mr. Davis testified that there was no way to determine the true identity of the samples that were analyzed (M.T. 41-42).

Berndt's motion for a new trial was denied and he filed this appeal to the Supreme Court.



ARGUMENT

I.

THE FAILURE TO PROVIDE THE
DISCOVERABLE MATERIAL REQUESTED
BY SKIP BERNDT'S ATTORNEY
REQUIRES REVERSAL AND A NEW
TRIAL BECAUSE THE FAILURE
VIOLATED THE MINNESOTA RULES OF
CRIMINAL PROCEDURE AND THE
REQUIREMENTS OF BRADY v.
MARYLAND, 373 U.S. 83, 10
L.Ed.2d 215, 83 S.Ct. 1194
(1963).

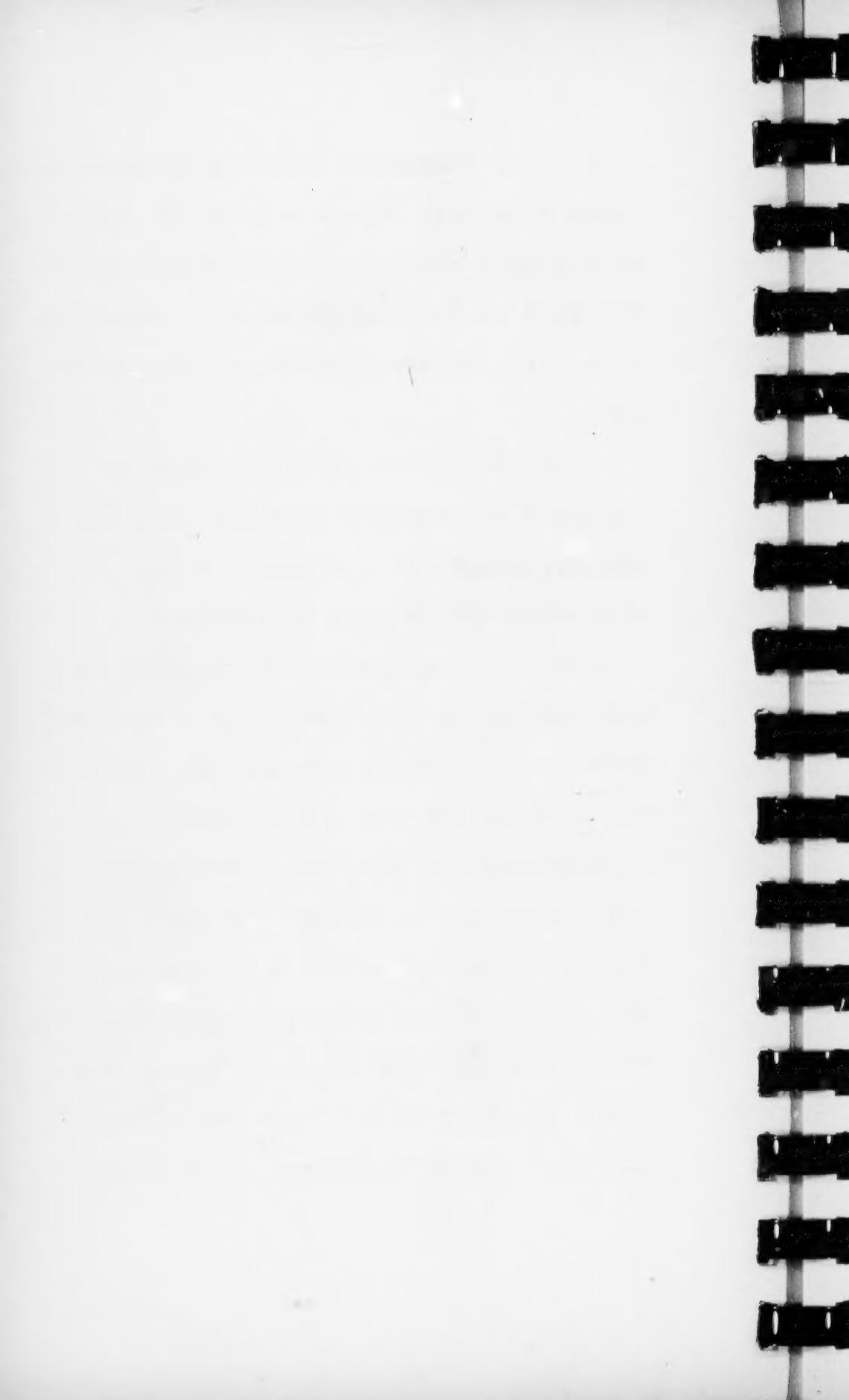
A. Introduction

At trial, Richard Tontarski testified for the State. Mr. Tontarski is employed by the Bureau of Alcohol, Tobacco, and Firearms as a forensic chemist. He received his Bachelor's degree in foreign affairs from the University of Virginia in 1976. He received his Master's degree in forensic science from George Washington University in 1978. Although he does not possess a bachelor's degree in chemistry, he has completed equivalent course work (T.



532). Mr. Tontarski received 26 samples taken from Skip Berndt's home (T. 536). Each sample was what fire investigators believed to be suspicious and indicative of burning by means of an accelerant (T. 351).

Mr. Tontarski testified that he analyzed the samples by means of a gas chromatograph (T. 537-540). A gas chromatograph is able to record graphically any hydrocarbon present in the sample. A hydrocarbon is a compound made up of hydrogen and carbon. There are between 300 and 400 distinct hydrocarbons in gasoline. The graphic representation produced by a gas chromatograph is called a chromatogram. The method of gas chromatography that Mr. Tontarski used was known as "purge and trap" (T. 2158-2159), also called the charcoal tubing technique (T. 539-540).



Of the twenty-six samples taken from the scene, Mr. Tontarski concluded that five showed the presence of hydrocarbons similar to those found in gasoline. In his opinion, the source of those hydrocarbons was gasoline. He believed gasoline was present in State's Exhibits 20 (stairway tread), 21 (entry), 22 (living room carpet), 23 (kitchen window sill), and 24 (northeast bedroom floor). The location in the home of these samples is indicated by circled "G" on Appendix A and B.

Pursuant to Rule 9 of the Minnesota Rules of Criminal Procedure, the defense specifically requested the chromatograms of the samples in which Mr. Tontarski found the presence of gasoline. Mr. Tontarski provided the defense with five chromatograms, one for each sample in which he believed gasoline was present (T. 556, 560, 562). He also provided the



chromatogram standards with which he used to compare the sample chromatograms (T. 555). These standards were introduced as Defendant's Exhibit A (T. 556). The chromatograms Mr. Tontarski provided the defense were also introduced into evidence as Defendant's Exhibits B (T. 556), C (T. 560), D (T. 560), E (T. 562), and F (T. 562). The standards which Mr. Tontarski provided to the defense (Defendant's Exhibit A) were necessary because the chromatograph itself does not identify the substances which are present. Any conclusion reached as to the identity of a substance depicted on the chromatogram is a subjective decision made by the examiner upon comparison of the chromatogram of the unknown sample with the chromatograms of the standards and considering elution time and quantity present (T. 585). Because Mr. Tontarski provided only one



chromatogram from each of the five samples, it was assumed by both the defense and the prosecution that there were no others (T. 1867-1868). Indeed, in his testimony, Mr. Tontarski clearly created this confusion. He sent five chromatograms to defense counsel. He never said there were others. In the following testimony, he said he sent a copy of "my chromatogram" for State's Exhibit #21; he did not say, "one of my chromatograms."

Q. Mr. Tontarski, I am now going to show you what has been marked as Defendant's B. I am going to ask you to explain to the jury what that might be?

A. This is a chromatogram or a Xerox copy that I provided of my chromatogram of Exhibits Number B-39 as I received it.

Q. Okay. Is that -- Then you sent a copy to me in the mail?

A. Yes. After you requested that, yes.

Q. Thank you. Is that an accurate copy to the best of your recollection of your actual chromatogram that was received from Sample B-39?

A. Yes, it is.

(T. 556, f. 13-25).

The defense presented expert testimony which disputed the State's theory. The defense expert, Robert Davis, testified that the five chromatograms he was presented (Defendant's Exhibit B, C, D, E, and F) did not show the presence of gasoline. However, Mr. Davis was puzzled by the condition of the containers in which the samples were placed. Given the fact that the State's chemist used the "purge and trap" method, Mr. Davis could not explain the presence of numerous holes in the bottoms of the containers.

On the day testimony ended, Mr. Tontarski was recalled to offer rebuttal



testimony. At that time, he revealed to the prosecutor the existence of other chromatograms which he believed showed the presence of gasoline in State's Exhibits 20-24. These had not been previously supplied to the defense. He also informed the prosecutor he could not produce the chromatograms because they were in his laboratory in Rockville, Maryland. This was the first time defense learned of the existence of the additional chromatograms.

Skip Berndt was convicted. Pursuant to a motion for new trial, the Honorable Doris Huspeni ordered that testimony be taken. Robert Davis was again called as a witness. His testimony is contained in the transcript volume entitled "Motion" and is referred to as M.T. (Motion Transcript). The Court also ordered that the additional positive chromatograms not supplied to the defense be turned over.



After analysis of the withheld chromatograms, the defense can now present additional relevant evidence in three areas. First, Mr. Tontarski did not use the "purge and trap" method of analysis as that phrase is used by the scientific community. Further, the methodology used by Mr. Tontarski is not a recognized reliable technique by either the scientific community or the manufacturer of the chromatograph (M.T. 27-28). Second, the compounds Mr. Tontarski considered important in the withheld chromatograms are found in ordinary building materials, such as carpet and tile mastic (M.T. 29-31). Third, the integrity of the sample had been violated thereby causing an incorrect interpretation (M.T. 40-43).

B. Analysis of Discovery Provisions of the Minnesota Rules of Criminal Procedure.

It is uncontroverted that a timely



demand was made for all of the positive chromatograms. It is also uncontroverted that all of the positive chromatograms were not delivered to the defense. The demand for the production of the positive chromatograms was made pursuant to Minnesota Rules of Criminal Procedure, Rule 9.01, subd. 1(4), which reads as follows:

(4) Reports of Examinations and Tests. The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments or comparisons made in connection with the particular case. MRCP 9.01, subd. 1(4).

Even though the prosecutor was unaware of the existence of the chromatograms until the end of trial, the duty to disclose is a continuing one on the State (see Rule 9.03, subd. 2 (a) and (b)). That duty was not satisfied in this case.



The Minnesota Supreme Court has announced a hard and fast rule to remedy a Rule 9 violation. In State v. Schwantes, 314 N.W.2d 243 (Minn. 1982), the Court reversed an arson conviction and ordered a new trial. The Court stated:

Consequently, in this case, although the evidence of defendant's guilt was strong, we conclude that a new trial is required in the interest of justice and to insure that the reciprocal discovery rules adopted by this court are observed by both the prosecutor and the defense. (Emphasis added).

Schwantes, at 245.

It is crucial to note that the Court did not consider the motives of the prosecutor, whether the violation was advertent or inadvertent, or the weight of the evidence. The Court ordered a new trial simply based upon a Rule 9 violation. The Court also held that the prosecutor has an affirmative duty to



disclose the information. It is not for the defense to go on a fishing expedition to uncover all discoverable evidence.

The State's position regarding the nonproduction of the additional chromatograms was that the defense could have discovered them by careful and vigorous interview and investigation of the State's expert. That position confuses the standards of newly discovered evidence with a Rule 9 violation. The standard of newly discovered evidence has no applicability to a Rule 9 analysis.

The State raised the same issues in Schwantes. Schwantes was convicted of arson. After defense counsel made discovery of the prosecutor's file, an agent from the Bureau of Alcohol, Tobacco, and Firearms filed a report which included statements the defendant's wife made which destroyed defendant's



alibi. That report was not given to defense counsel. The State argued that any failure to disclose was inadvertent. Also, the witness was defendant's wife who was interviewed by the defense attorney; the State argued that it should not be penalized for the wife's failure to disclose her conversation to her husband's lawyer. The Court found none of those arguments persuasive, reversed, and ordered a new trial.

In the case before this Court, the evidence of guilt is not strong, as it was in Schwantes. At best, it is a close call. It was only by mere chance that the presence of additional chromatograms was discovered. With this fortuity, the defense can now present evidence that might well result in an acquittal. The State failed to fulfill its affirmative obligation to disclose all discoverable items. Schwantes and



the interests of justice require a new trial.

C. Analysis of Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

Pursuant to the motion for new trial, the trial court ordered the taking of testimony of not only Robert Davis but also Richard Tontarski, the State's expert. It is our position on appeal that consideration of Mr. Tontarski's deposition is improper. It confuses the rules on newly discovered evidence with exculpatory evidence and the discovery requirements of the prosecutor. In newly discovered evidence, the moving party must show the evidence was not discoverable exercising due diligence and also show a substantial likelihood that the new evidence would change the outcome at trial. State v. Jacobson, 326 N.W.2d 663 (Minn. 1982). The court in Schwantes, in reversing a conviction



where evidence was strong based upon the non-disclosure of evidence that made guilt even stronger, made it abundantly clear that the impact on the jury was not relevant.

It is also Skip Berndt's contention that failure to provide the other positive chromatograms was the non-disclosure of exculpatory evidence and thereby also requires a new trial. Based on Mr. Davis' testimony, the defense would have moved the Court, pursuant to Frye v. United States, 283 F. 1073 (D.C. Cir. 1923), for an order barring the testimony of the State's expert on the grounds that the method used was not recognized by the scientific community nor the manufacturers of the gas chromatograph. The additional chromatograms which were provided the defense after trial showed shifting and were different, one from the other, on



the same sample (M.T. 32). Chromatograms that show such a change can only do so because foreign objects have been introduced into the sample (M.T. 32).

The following testimony of Mr. Davis is illustrative:

At that time I left this Courtroom at the original trial, it was still my belief that several samples were taken from the can and that the individual holes at the base of the can were from individual samples where one would be sealed while another sample is being taken.

Now, having seen the methodology that was used, I realize that the holes were drilled in the cans in order to admit air from the surrounding atmosphere through the can while the samples were being taken to prepare it for the chromatograph.

(M.T. 26-27).

In my opinion that methodology will not give an adequate representation of what is in that sample.

(M.T. 28, f. 19-21).

I contacted two manufacturers; Perkin-Elmer, who manufactures gas chromatographs and Varian Aerograph (Ph.)

Q. Who is that?

A. They also manufacture chromatographs. The man in charge of training there is Dr. David Dunham (Ph.) and I explained the method entirely to him. And he said --

(M.T. 27, f. 13-20).

The manufacturer's representative substantiated my position.

(M.T. 28, f. 10-11).

Accordingly, the State's chemist was inaccurate when he testified he used the purge and trap method of analysis. Also, the method was not scientifically accurate and therefore the result should not have been admitted.

The defense, now, could also show that the State's expert was not interested in the chromatogram as a whole but rather a certain portion of the range



of hydrocarbons occurring within a segment of the range of gasoline. As Mr. Davis testified:

A. Based upon the method that he used to interpret the chromatograms, I now have learned what peaks he was interested in when he was interpreting those chromatograms.

(M.T. 29, f. 6-9).

A. In your average household they [the peaks of interest] would be found in the normal plastics; they will be found in the acrylic monomer-type carpet, the PBC-type carpet, the mastic that holds down floor tiles. Those are the places that I can think of immediately without going too far.

Q. We didn't know that the first time around?

(M.T. 29, f. 20-25).

A. I did not know the compounds that he was especially looking at.

Q. And then you found that out because of additional information that we received?

A. That's correct.

(M.T. 30, F. 1-5).

Finally, Mr. Davis would testify regarding the importance he attached to the fact that the chromatograms from the same sample were different, something which does not happen in chromatography that is done correctly.

A. The chromatograms themselves that were supplied in the latest group of evidence represent both materials that were called negative and materials that were additional runs of those samples which were ascertained to be positive.

(M.T. 30, f. 22-25).

A. In the latest production of documents there would be two or three additional A-10s [State's exhibit 22]. Now, the thing that I would tell the jury and that I have discussed completely is that each of those additional A-10s individually are different.

Q. What significance does that have?



A. It demonstrates beyond any doubt in my mind that the technique that was used was totally defective, chromatograms will not shift, they will not change of an identical sample. In addition to this, there is apparent an anomaly or abnormality in those chromatograms that as a sample remained in the laboratory longer,

(M.T. 31, F. 11-25).

additional hydrocarbons were pulled from that sample in greater amounts .

• •

The significance is which of the three or four or two chromatograms do I believe? The first one which was run which is an insignificant amount of hydrocarbons? The second amount which has a greater amount of hydrocarbons and the third one which is completely off the scale of the chromatograph . . .

no sample will change that much if it is properly secured. There are demonstrated in this trial, chromatograms that had insignificant amounts present the first day they were analyzed . . .



A. The peaks that were there will always be there regardless of what technique you use, the quantity removed by your preparation technique may change, but those peaks will individually be there.

Now, . . . run a second sample . . . all of a sudden we have new

(M.T. 32, F. 1-25).

hydrocarbons appearing. The ones that were there before may or may not be there from the first sample run. Now, we are going along to the third run and we have an entirely different sample matrix, which demonstrates to me that the sample integrity has been violated.

(M.T. 33, F. 1-5).

The problem is exacerbated by the fact that of the five chromatograms run on the same sample, none of which produced the same result, we do not know which one in the series of three, four, or five were provided to the jury or

which one was used by Tontarski to form his opinion.

Even if the Court ruled the above evidence was insufficient to bar Mr. Tontarski's testimony, it would still be relevant as exculpatory evidence. This State has a long history favoring the introduction of such evidence and also consciously refraining from predicting the impact the evidence would have on a jury. In State v. Bock, 229 Minn. 449, 39 N.W.2d 887 (1949), the defendant unsuccessfully attempted to introduce testimony to show that two Spreigls were committed by someone else. The Supreme Court reversed the conviction, holding the evidence offered by the defendant should have been received. But, more importantly, the Court held that it was not for the Court to attempt to determine the importance of the evidence. Rather, the importance must be determined by the

jury. The Court cited and adopted the reasoning of Commonwealth v. Murphy, 282 Mass. 593, 183 N.E. 486 (1933):

Mistake in identification by one person does not prove another one wrong. These are considerations for a jury. But, owing to the ruling, no jury has passed upon them . . . it would seem that the defendant is entitled to have a jury consider the evidence, pass upon its credibility and weigh it with the evidence of identification upon the issue of his guilt. Bock, at 457.

The United States Supreme Court has also held that a Court should not intervene in the jury's function and attempt to independently determine what weight to attach to exculpatory evidence. In Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), exculpatory evidence at the sentencing phase of the trial was suppressed by the prosecution notwithstanding defense counsel's attempt to examine it. The Court held that failure to disclose



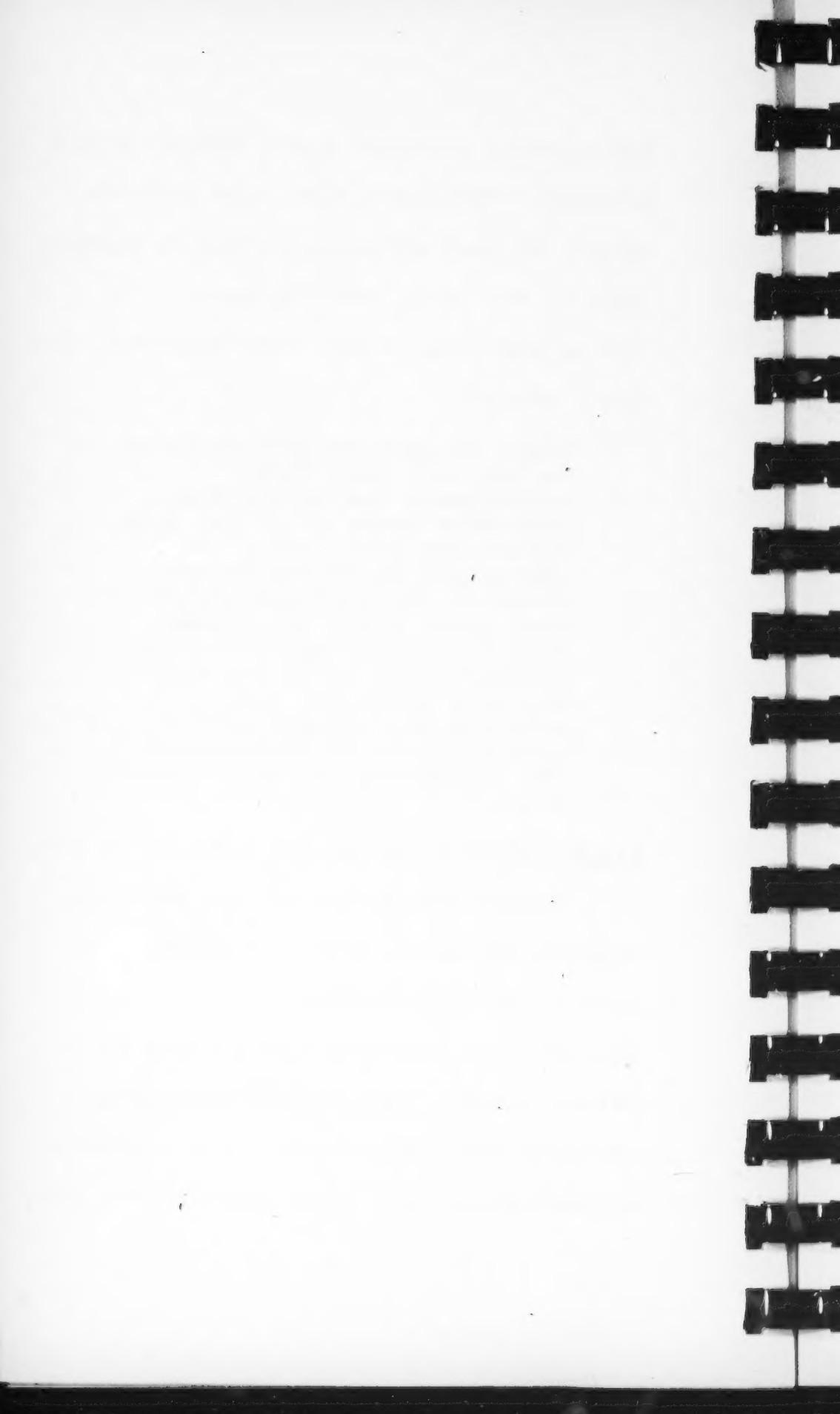
exculpatory evidence was a denial of due process. The Court also held that the weight of that evidence should be passed upon by the jury, not the Court. In citing the lower court with approval, the Court stated:

There is considerable doubt as to how much good [the] undisclosed confession would have done Brady if it had been before the jury . . . We cannot put ourselves in the place of the jury and assume what their views would have been . . . [I]t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady.

Brady, 373 U.S. at 88, 10 L.Ed.2d at 219.

The chromatograms of the positive samples Tontarski made are clearly the results of a scientific test.

Consequently, defense had a right to it before trial. Schwantes requires a reversal and a new trial. The withheld chromatograms call into question the very



methodology the State used. As a result, the defense would have attempted to bar the State's expert's testimony on the ground that his method was not recognized by the scientific community. If the method is invalid, the result is also. This requires reversal and a new trial. Finally, it is Skip Berndt's position that the withheld information is exculpatory. It is exculpatory because it graphically shows the appearance of new substances as the testing procedure continues. It is exculpatory because the chemist was not concerned with an entire chromatogram but limited areas within the chromatogram. It is exculpatory because it shows the State's method of analysis was not only unreliable, but also tainted. Brady requires reversal and a new trial.

II.

BECAUSE THE PRIMARY OBJECTIVE OF THE SEARCH OF APPELLANT'S HOME WAS TO SEIZE EVIDENCE OF ARSON TO BE USED AGAINST APPELLANT, A SEARCH WARRANT WAS REQUIRED. THEREFORE, FAILURE TO SUPPRESS THE EVIDENCE CONSTITUTES PLAIN ERROR REQUIRING REVERSAL.

Skip Berndt's Fourth Amendment rights were violated by fire and police arson investigators when they seized a variety of samples, solely for the purpose of gathering evidence of arson. The samples were seized from Skip's home without a search warrant and neither pursuant to any exigent circumstances encompassing a continuous fire investigation. The Fourth Amendment to the United States Constitution, and Article I, section 10 of the Minnesota Constitution, protect the right of the people to be secure in their persons, houses, papers, and effects against



unreasonable searches and seizures. This protection extends to fire damaged property, especially when a private dwelling is involved. See, Michigan v. Clifford, ____ U.S. ___, 104 S.Ct. 641, 78 L.Ed.2d 477, 483 (1984); Michigan v. Tyler, 436 U.S. 499, 505 (1978); State v. Olsen, 282 N.W.2d 528 (Minn. 1979).

A search conducted without a warrant is per se unreasonable, Coolidge v. New Hampshire, 403 U.S. 443 (1971), and evidence seized is subject to the exclusionary rule. This rule is subject only to a few specifically established and well-delineated exceptions.

Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973), quoting Katz v. United States, 389 U.S. 347, 357. (1967). These exceptions arise pursuant to a variety of circumstances, called "exigent circumstances", that justify dispensing with the warrant requirement for a search



in a particular place. Coolidge, 403 U.S. at 474-75.

In cases involving fire fighters entering a fire scene, the Court has recognized three related exigencies which justify dispensing with the warrant requirement in limited cases. First, fire fighters may enter a burning building as an "emergency response" unrelated to the gathering of evidence. Second, fire investigators may enter the post-fire site to determine the cause of the fire as a "public interest" exigency. Finally, as a corollary to the second exception, administrative officials may remain on the site a reasonable time pursuant to a continuous search contemporaneous with determining the cause of the fire and preventing rekindling. Skip does not assert a violation of his constitutional rights



due to the initial entries to fight the fire in his home.

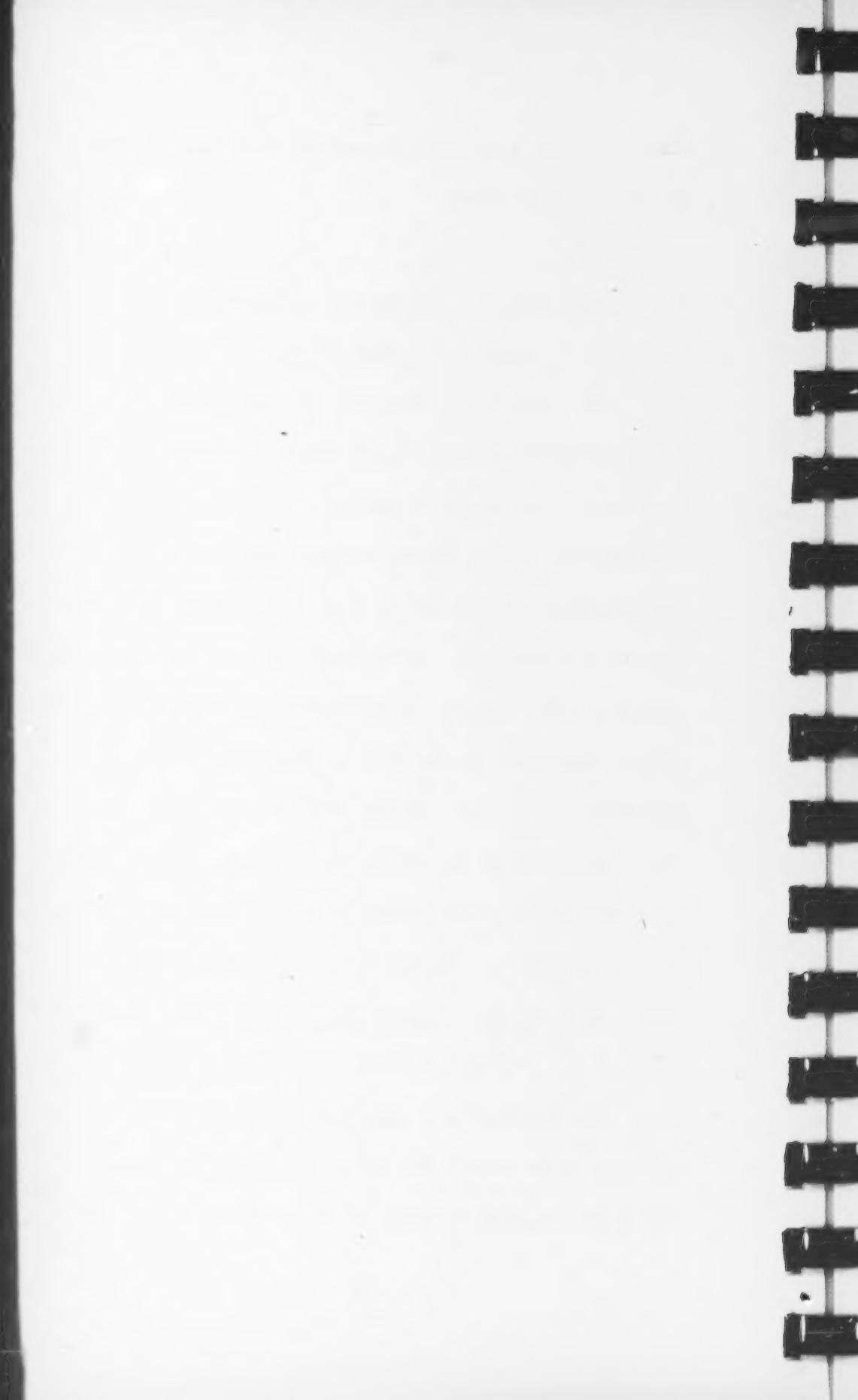
* * *

A. The Public Interest Exigency.

1. Cause of the Fire.

The need to search in post-fire inspections flows from the need to protect the public safety. "The aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain a warrant or to secure the owner's consent to inspect fire-damaged premises. Because determining the cause and origin of the fire serves a compelling public interest, the warrant requirement does not apply in such cases." Clifford, 78 L.Ed.2d at 484; see also, State v. Olsen, 282 N.W.2d 528, 531 (Minn. 1979).

To justify a warrantless post-fire entry, the need to search must be to determine the cause of the fire.

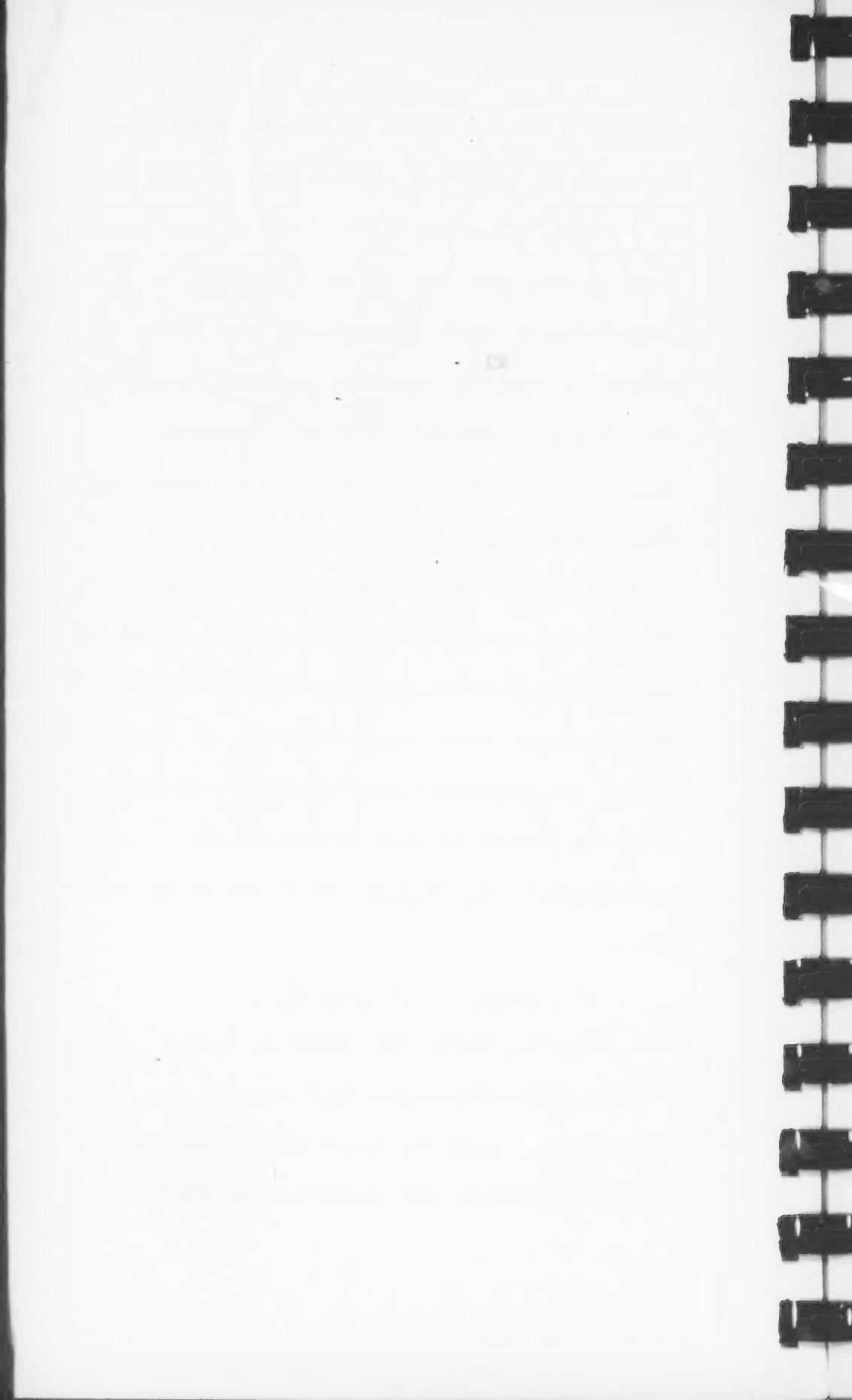


However, it is equally clear that where no such exigency exists, and in the face of probable cause that a crime has been committed, the law is preemptory in its requirement that investigators first obtain a search warrant before entering another's premises without consent.

Tyler, 436 U.S. at 512; citing Camera v. Municipal Court, 387 U.S. 523, 534 (1967). "If the primary objective of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched." Clifford, 78 L.Ed.2d at 484-85.

2. Continuous Search.

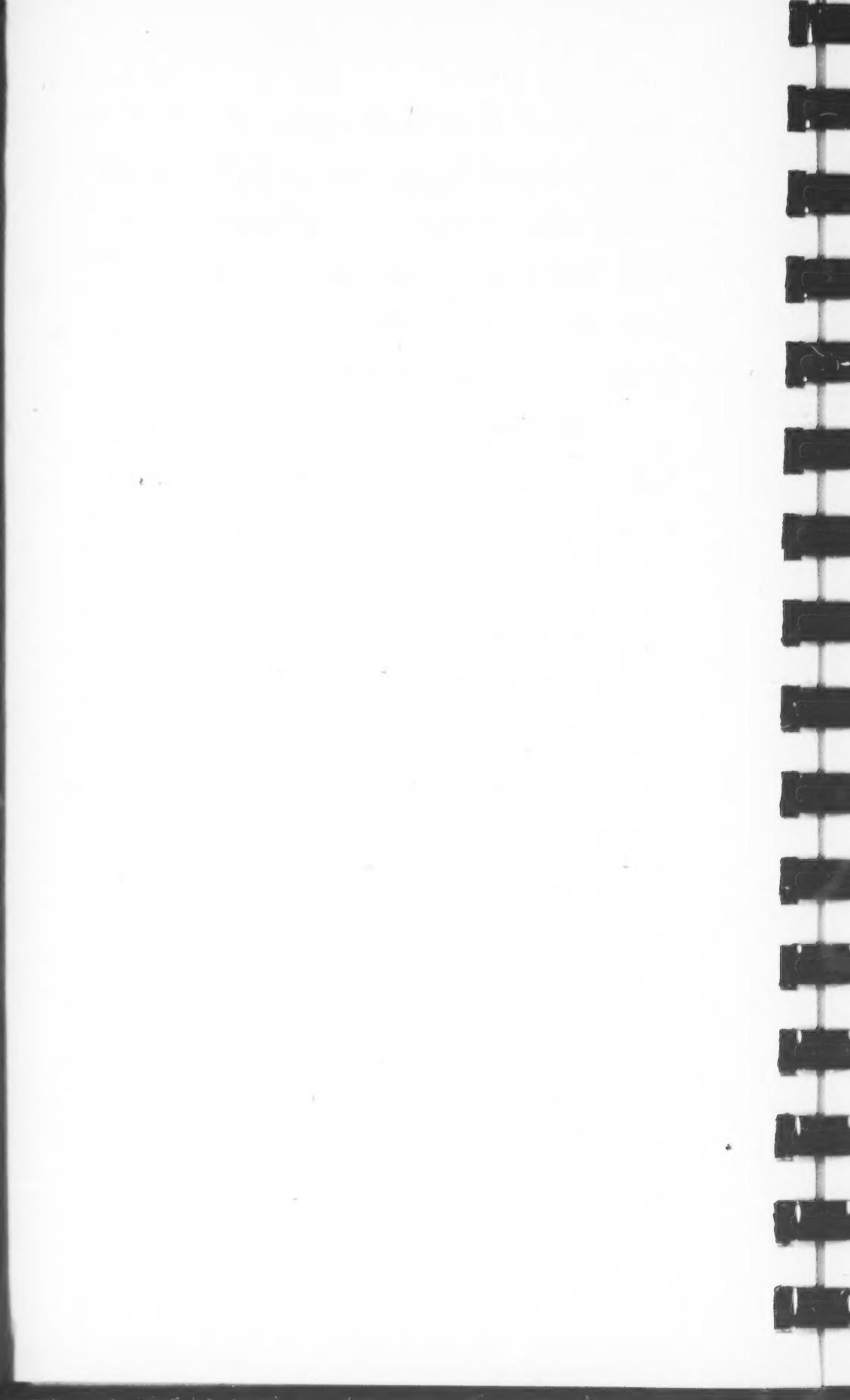
Having made the initial post-fire entry, the officials may remain a reasonable time as part of a continuous search. While not clearly delineating



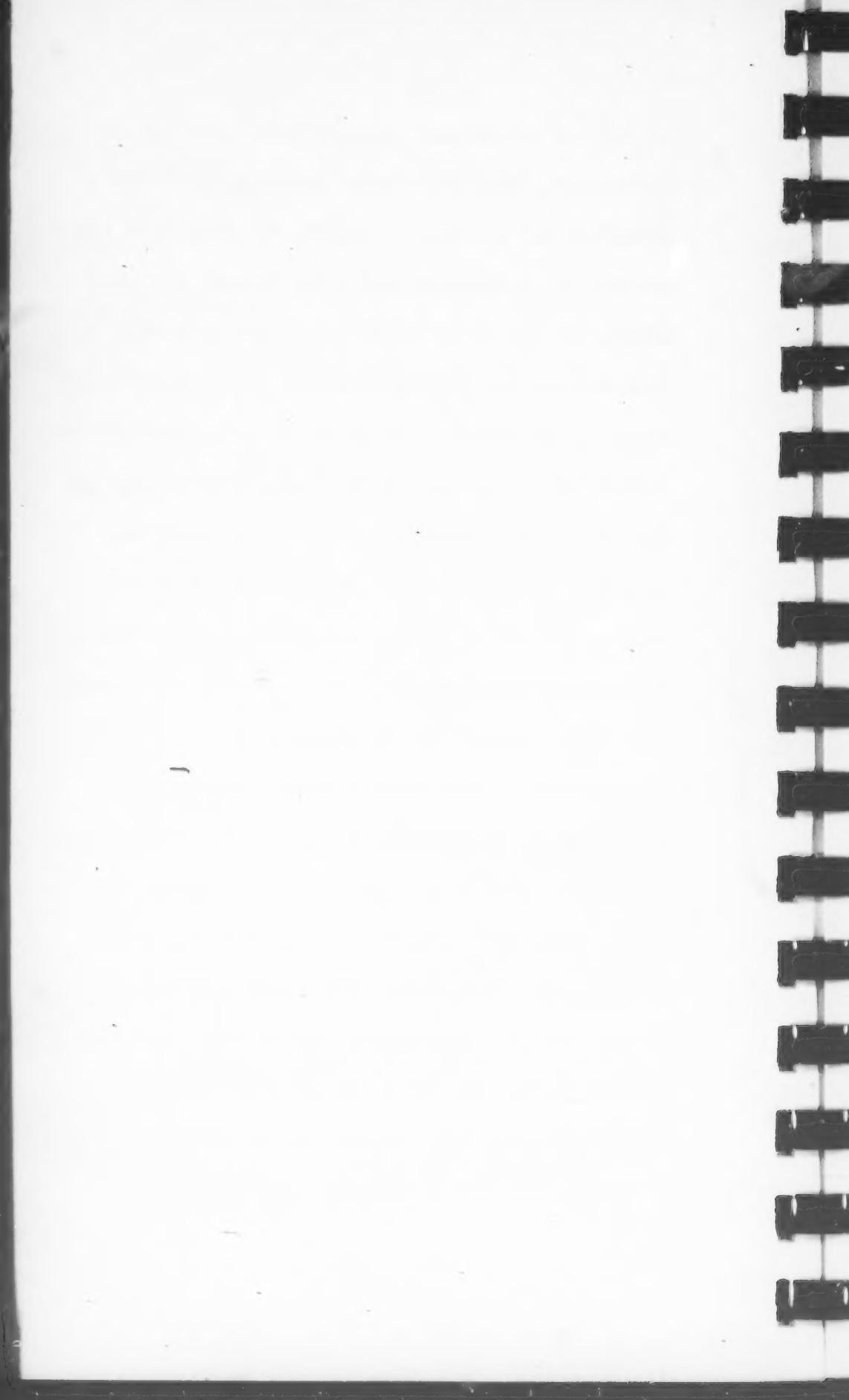
the limits of a "continuous search," the Court in both Tyler and Clifford makes clear that it must be contemporaneous with the public interest served in finding the cause of the fire and preventing rekindling.

The need to search will vary with the complexities involved in the fire site. Fires in massive commercial structures may justify an extensive search, with multiple re-entries, even after the cause is known. The possibility of rekindling is far greater in such cases. However, small homes will not pose such problems, and once the cause is known, any further search may require a warrant. Tyler, 436 U.S. at 510, n. 6; Clifford, 78 L.Ed.2d at 487, n. 9.

The Tyler and Clifford cases make evident that if the primary objective of the search is to gather evidence of a



crime, a criminal search warrant is required, and may only be obtained on a showing of probable cause to believe that relevant evidence will be found in the place to be searched. *Id.* at 484-85. The entry no longer serves the recognized need to protect the public interest which justified the entry to find the cause of the fire and the continuous search to prevent rekindling. The exception for exigency, like other exceptions to the warrant requirement, is limited in reach "to that which is necessary to accommodate the identified needs of society." Arkansas v. Sanders, 442 U.S. 753, 760 (1979); Mincey v. Arizona, 437 U.S. 385, 393 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). Thus, "[i]f the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of



probable cause] will apply." Tyler, 436 U.S. at 510.

The Court has not created a new "continuous search" exception, because the search is limited to the underlying exigency. "Such investigations constitute a continuation of the first legal warrantless entry, and do not violate the Fourth Amendment of the Constitution since a compelling public interest is served in determining the cause and origin of fires." Commonwealth v. Smith, 479 A.2d 1081, 1085 (Pa. Super. 1984) (Cirillo, J., dissenting), citing Tyler, 436 U.S. at 509.

* * *

In the instant case, the "public interest" rationale does not justify the search and seizure from appellant's home. Police and fire arson investigators seized samples of carpet, floor, wall, tile, and



other samples in an accusatory search intended to gather evidence of arson to use against Skip. The rationale may not be applied to a search made after the exigency lapsed, where fire and police arson investigators suspected Skip of arson, cordoned off his home leaving specific instruction not to touch the site, accused and interviewed Skip regarding arson, and later returned to search for and seize evidence of arson.

The entries cannot be said to have been made pursuant to a "public interest" exigency either to determine the cause of the fire or to prevent rekindling. The fire was reported at 2:51 a.m. on Friday, August 22, 1981 (Omnibus Hearing Transcript, page 67) (hereinafter cited as O.H.T.). Firemen arrived at 2.56 a.m., by which time the fire engulfed the entire home (O.H.T. 67). They controlled the fire around 3:34 a.m. (O.H.T. 46).



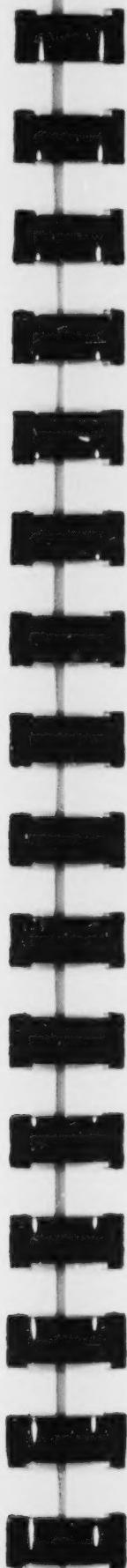
The firemen then made an initial sweep of the house to look for fire victims (O.H.T. 48).

Prior to the initial search, officials suspected arson. Brooklyn Center Fire Marshall Gerald Pedlar, the man in charge of all of the operations, stated on direct examination:

Q. "Up to the point of finding the victims, was there anything about the fire that aroused your curiosity as a cause and origin investigator?"

A. "Yes. In talking with the individuals, the police officers, at the scene, the fact that the fire alarm came in at 2:51, the first truck arrived on the scene at 2:56, and at that time we have total involvement of the entire townhouse area is unusual in itself."

(Trial Transcript, page 729) (hereinafter cited as T.T.). Upon entering the building to search for the fire's victims, Pedlar saw heavy bubbling, scarred areas in the tile in the entry



hall, which he said was unusual and had only seen once before (O.H.T. 87). He thought an accelerant must have been used (O.H.T. 88). No evidence was seized on this initial search, nor had any evidence of low burn or the possible presence of flammable liquid been discovered (O.H.T. 66).

After this initial sweep search for the victims of the fire, Marshall Pedlar instructed District Chief Robert Drew "that none of the scene was to be touched until we got back to initiate our investigation" (T.T. 735) (Emphasis added). Pedlar wanted to interview Skip about the circumstances of the fire and asked the police to see him (O.H.T. 67).

Both police and fire officials treated Skip as the suspect in an arson case prior to the seizures in question. Joel Downer, of the Brooklyn Center Police Department, consulted with ranking



fire officials at the scene, who told him the fire was of a suspicious origin (O.H.T. 101). In response to this advice, Downer ordered Brooklyn Center Policeman Adams to bring Skip in for questioning (O.H.T. 101). Officer Adams was told to treat him as a suspect and to bring him back "whether he wanted to come or not" (O.H.T. 16).

Officer Adams brought Skip from his sister's house to the Brooklyn Center Police Department at about 5:30 a.m. (O.H.T. 33). He frisked Skip for weapons (O.H.T. 17), placed him in a locked cell block (O.H.T. 19), and told him he was a suspect (O.H.T. 20).

At 6:00 a.m., the police and fire arson investigators interviewed Skip about the fire (O.H.T. 113). Present were Detective Spehn and Sergeant Downer, Brooklyn Center Police Department, Lieutenant Running and Detective Harding



of the Hennepin County Sheriff's Department, and Marshall Pedlar (T.T. 968). Detective Spehn told Skip that he was a possible suspect "because of the fact that we had been informed by fire investigators at the scene that this was a very rapid fire; the fact that there were four fatalities and that he was the only apparent survivor . . ." (O.H.T. 113). Detective Spehn then read Skip his rights under Miranda (O.H.T. 113).

In Clifford, the Court found unconstitutional a search where investigators had probable cause to believe arson occurred. Clifford involved a fire in a private home. Fire fighters extinguished the fire at 7:04 a.m. and left. An arson investigator was told to inspect the site at 8:00 a.m., but he was delayed until 1:00 p.m., by which time the Cliffords had already had workers board up the home. The



investigator found a fuel can the firemen had discovered and left by the door.

When the basement was pumped out, the arson investigators entered, detected fuel odor, and found evidence that a timing device was possibly used to start the fire. The investigators then moved from the basement to search the rest of the two-story house.

Applying Tyler, the Court found that the arson investigator's entry violated the Fourth Amendment. The Court found two separate entries: the first of the basement concerning the cause of the fire, and the second of the upstairs concerning evidence of the fire.

Clifford, 78 L.Ed.2d at 485. The need to search the basement for the cause of the fire was justified by the "public interest" exigency. However, while the initial basement entry was appropriate under the "public interest" exigency, the



search of the rest of the house was unconstitutional. "Because the cause of the fire was then known, the search of the upper portions of the house, described above, could only have been a search to gather evidence of the crime of arson. Absent exigent circumstances, such a search requires a criminal warrant." Id. at 486.

As in Clifford, when the officials in the instant case began the second search, they were looking for evidence of arson implicating Skip. At 9:00 a.m. on Saturday, August 22, Marshall Pedlar returned to the scene (O.H.T. 70). Pedlar met Detective Spehn, and Ward Mahlen, assigned to the Crime Lab at the Hennepin County Sheriff's Department, at the scene, and they began their search for evidence implicating appellant of arson (O.H.T. 70). They were looking at

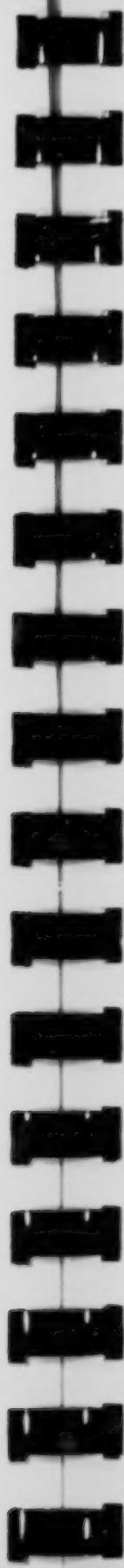


the low areas of the townhouse and the consumption of combustibles (O.H.T. 60).

After the intial sweep, Pedlar knew that the fire was out and would not rekindle. He ordered the area cordoned off and ordered that no one was to touch anything. Pedler than left and did not return for three hours, after interviewing Skip as an arson suspect. No investigation into the cause of the fire had been initiated in the early morning sweep. The investigation was not begun until 9:00 a.m., and cannot be viewed as a continuation of the early morning sweep. When Pedlar and the others returned, they were looking for arson evidence to use against appellant.

* * *

The present record rebuts exigency because it contains nothing to show that it was impossible or unreasonable for the investigators to obtain a criminal



warrant. There was no evidence that a delay in the search and cleanup efforts would have endangered the public safety, created additional danger, or otherwise have been unreasonable. Clearly, there was adequate time and opportunity for Spehn and Pedlar to obtain a search warrant. At best, there is a suggestion of inconvenience, but constitutional guarantees must always prevail over mere convenience to police and fire officials.



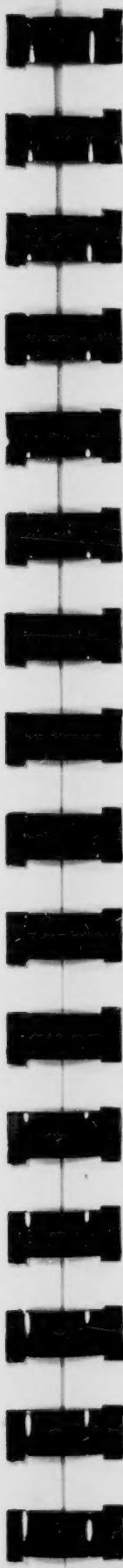
III.

THE PRESENTATION OF THE STATE'S CASE DENIED SKIP BERNDT A FAIR TRIAL.

- A. The State Introduced Evidence To Prove Skip Berndt's Bad Character Even Though Skip Berndt Did Not Place His Character In Issue.

"No rule of criminal law is more thoroughly established than the rule that the character of the defendant cannot be attacked until he himself puts it in issue by offering evidence of his good character." City of St. Paul v. Harris, 150 Minn. 170, 171, 184 N.W. 840 (1921). This rule has been codified with the adoption of the Minnesota Rules of Evidence in Rule 404(a). The Minnesota Supreme Court in State v. Loebach, 310 N.W.2d 58, 63 (Minn. 1981), listed three basic reasons for the rule:

First, there is the possibility that the jury will convict a defendant in order to penalize him for his past misdeeds or



simply because he is an undesirable person. Second, there is the danger that a jury will overvalue the character evidence in assessing the guilt for the crime charged. Finally, it is unfair to require an accused to be prepared not only to defend against immediate charges, but also to disprove or explain his personality or prior actions.

In the instant case, the State, by introducing character evidence, invited the jury to find appellant guilty on the basis of his lifestyle. That evidence includes the following characterizations:

1. That appellant had attempted sexual relations with Amanda Simmons, a minor who babysat for the Berndts, three years before the fire (T. 510-519).
2. That appellant attempted to have an affair with Mrs. Berndt's sister, Marla Henne, prior to and during his marriage to Mrs. Berndt (T. 608-621).
3. That appellant discussed



swapping wives with Glenn A. Snow on the night of the fire (T. 626-634).

4. That appellant may have been womanizing and was drinking the night of the fire (T. 638-643).

5. That appellant had touched the breast of Miss Sandra Jacobs when she was a passenger in a car driven by appellant when Mrs. Berndt was also present (T. 657-660).

6. That appellant would, at times, get moody and mad when drinking (T. 684).

In addition, appellant was characterized as a drug user (appellant admitted to smoking marijuana). Yet, "evidence of other crimes is not admissible to prove that an accused is a bad person and therefore likely to have committed the crime in question. Indeed, the rule is beyond dispute . . ." United States v. Woods, 484 F.2d 127, 133 (4th Cir. 1973) (citations omitted).



It cannot be overstated that the introduction of the bad character evidence should have been excluded. However, since such evidence was before the jury, the damage has been done and the remedy is either a mistrial or reversal. As the Minnesota Supreme Court stated in State v. Saucedo, 294 Minn. 289, 200 N.W.2d 37, 39 (1972), to allow the jury to consider the defendant's possible participation in "unlawful activity other than that of which he has been formally accused cannot but jeopardize the fairness and trustworthiness of its verdict and cannot but work to defendant's prejudice."

The State's position was that this evidence was necessary to show a motive to act. However, both Mr. & Mrs. Berndt ended a previous marriage through divorce. There was no evidence to show why he would now use murder to end a



marriage. Further, there was no evidence that the marriage was unstable. The State's motive theory is simply the belief that Skip Berndt should be convicted because he is morally offensive. Consequently, a new trial is in order.

B. The State Urged The Jury To Speculate And Thereby Base Its Decision On Factors Not Admitted Into Evidence.

The presentation of the State's case further denied Skip Berndt a fair trial because it urged the jury to speculate on factors not admitted into evidence. The State urged the jury to speculate that Skip and Brenda Berndt had had a fight that evening prior to the fire resulting in a blow to the head of Brenda. The coroner testified that he saw no concussion or fracture to Brenda Berndt's head (T. 885-886). However, he could not



rule out the possibility that she was struck in the face and knocked out (T. 887). No gas can or syphoning equipment was ever found but the jury was asked to speculate on three possible scenarios: (1) that Skip stole the gas from the caretaker's supplies even though the caretaker testified he had noticed no missing gasoline and no foul play with regard to his equipment (T. 918); (2) Skip-syphoned gas from cars in the parking lot, however, no evidence was presented to that effect; and (3) that no cannister for the gasoline was found because Skip had thrown the gasoline cannister in the garbage dumpster which was emptied in the morning of August 21, 1981. However, there was no evidence to support these premises.

The jury was also asked to speculate and accept the premise that only guilty persons would run to safety from a



blazing fire. In relationship to Skip's flight to safety, the jury was also asked to speculate that appellant was guilty because he showed a lack of emotion when visited by the hospital Chaplain (T. 1056). However, the Chaplain testified that Skip's reaction was a cause for concern because he was internalizing his grief (T. 1057-1058). The jury heard evidence by the defense of Skip's emotional collapse later in the day when he was with his family and minister (T. 1237).

Finally, the State urged the jury to speculate as to the amount of gas present in the home of Skip (T. 930). The State's expert guessed there was a minimum of five gallons (T. 930). However, no scientific experiments were offered into evidence by the State to duplicate its assertion on the amount of gasoline. In addition, the testimony



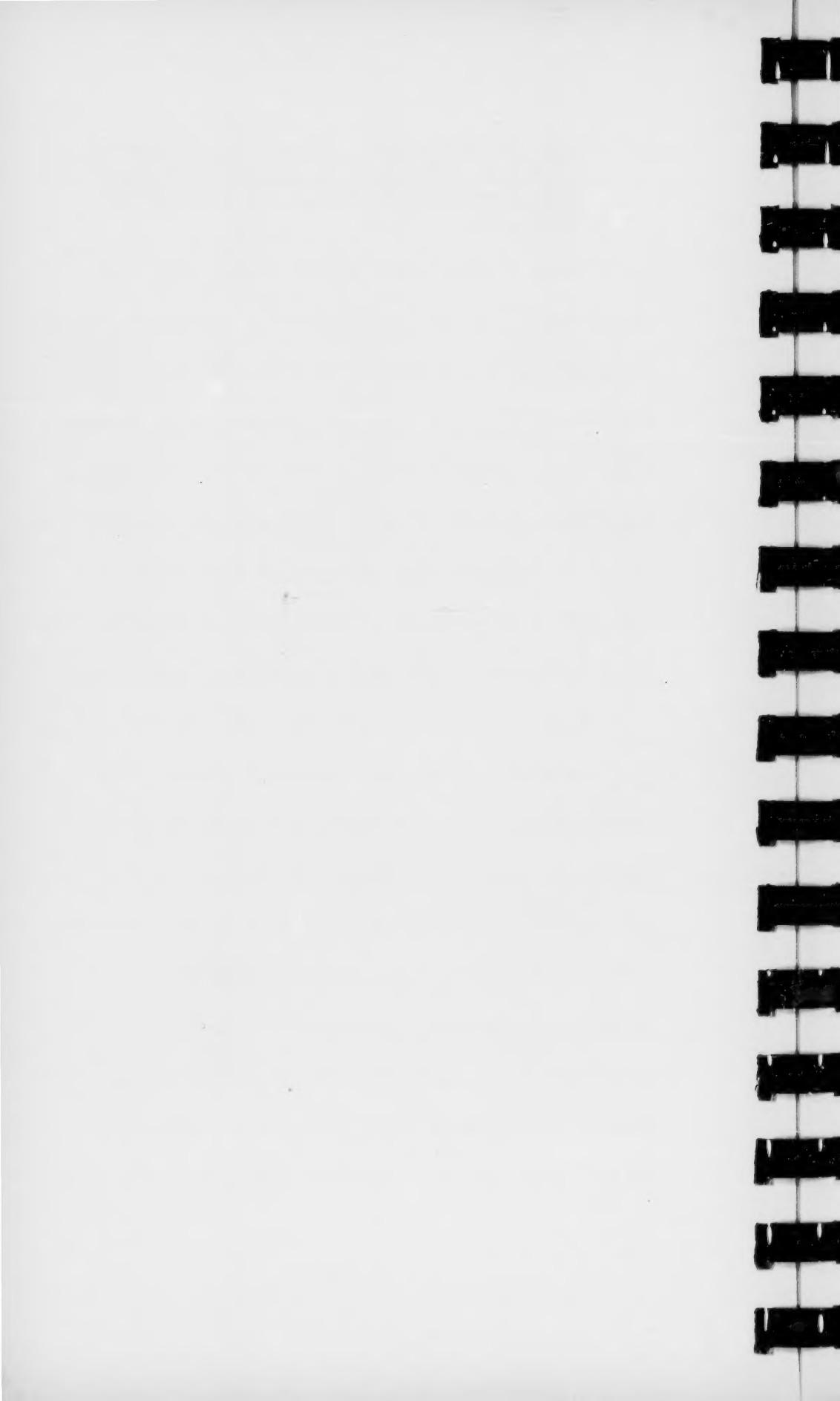
concerning a fire caused by five gallons of gasoline ranged from the possibility of no ignition to a building-demolishing explosion. Such "evidence" allows the jury to guess and select whichever set of facts it likes.

The presentation of these speculations denied Skip Berndt a fair trial because it allowed the jury to speculate on factors not admitted into evidence resulting in prejudicial harm to Skip and requiring reversal of his conviction. Berger v. United States, 295 U.S. 78 (1934). The Court in Berger warned that ". . . improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." 295 U.S. at 88.



C. The Intentional Delay In Bringing Charges Against Skip Berndt Denied Him The Opportunity To Prepare A Defense.

The Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense. United States v. Gouveia, ___ U.S. ___, 81 L.Ed.2d 146, 104 S.Ct. ___ (1984). In the instant case, the indictment should have been dismissed because the government's delay in bringing the indictment was a deliberate device to gain an advantage over appellant which resulted in actual prejudice in presenting his defense. The State possessed all the facts shortly after the fire. Indeed, Mr. Berndt was



informed on October 6, 1981, that the case was at the county attorney for charging. However, Skip was not indicted until August 17, 1982, approximately four days short of one year after the August 21, 1981 fire. The delay in the indictment resulted in extreme prejudice to Skip because he, through his attorney, was unable to independently view and evaluate the fire scene.

Generally, the State has no duty to charge. However, once an individual has been charged, there is an obligation by the defense attorney to diligently investigate the facts. The Defense Function Standards make this duty clearly specific:

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the

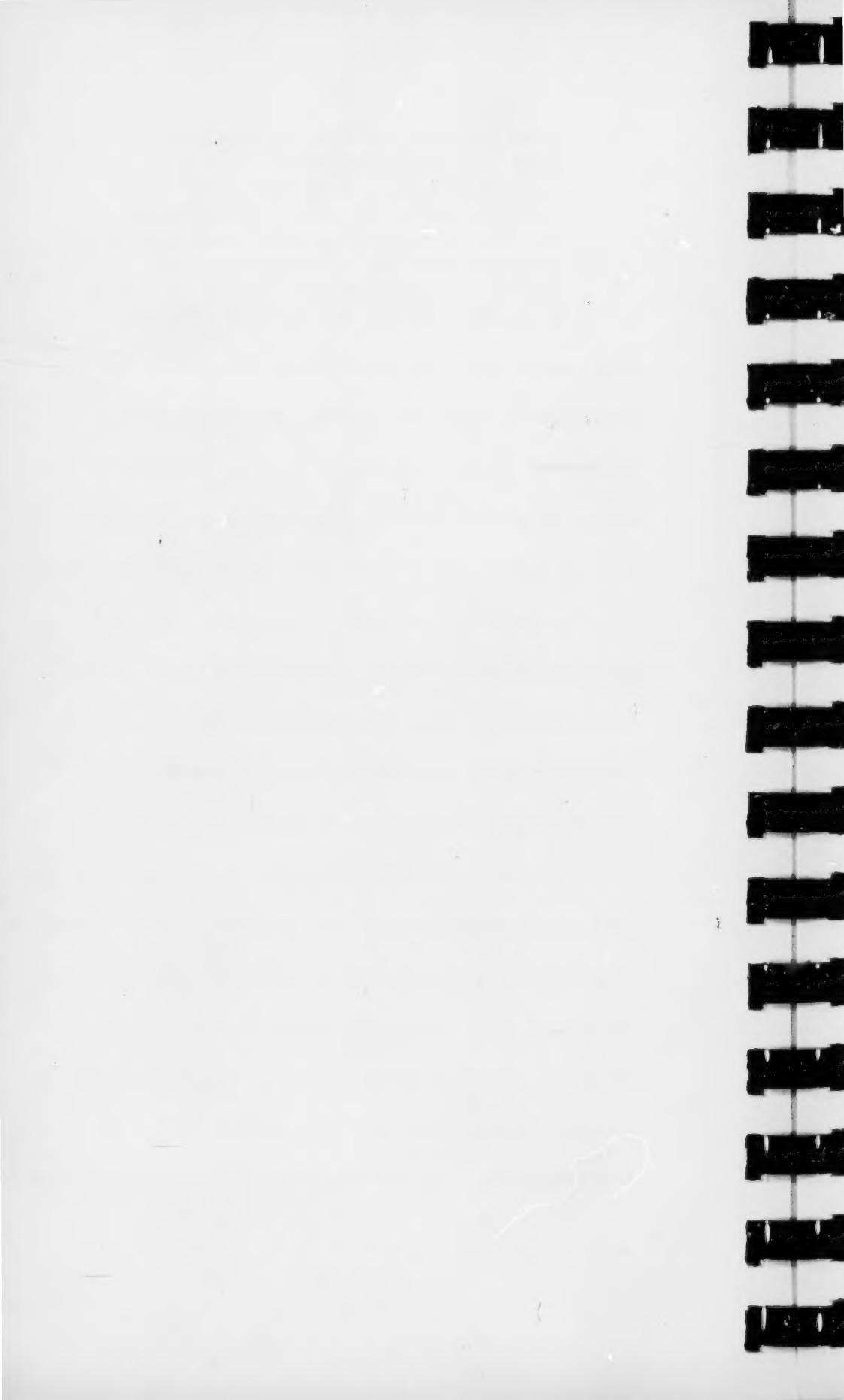


possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

American Bar Association Project on Standards for Criminal Justice, The Defense Function §4.1. The comments to this standard cite Shepherd v. Hunter, 163 F.2d 872, 873 (10th Cir. 1957), for the proposition that "failure to make adequate pre-trial investigation and preparation may be grounds for finding ineffective assistance of counsel."

Commentary, Defense Function §4.1.

In the instant case, defense counsel had no opportunity to investigate. While the State possessed evidence detrimental to Skip (26 samples were taken from Skip's home), Skip had no opportunity to investigate due to the delay of the indictment. When Skip had been indicted,



the scene of the fire had been demolished. Thus, Skip could only rely on the State's evidence for his defense. In addition, the State's witnesses testified as experts in the field of fire protection and arson stemming from their role as fire fighters. Their opinions were based on visual observation of the scene. Skip was denied an effective opportunity to rebut those opinions formed by observation because the scene of the fire had been destroyed before his indictment, denying him the opportunity to prepare a defense. Thus, the inordinate delay between the alleged crime and indictment resulted in the intentional impairment of Skip's ability to present an effective defense.

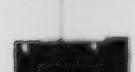
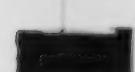
Skip Berndt was told on October 6, 1981, by Donald Spehn of the Brooklyn Center Police Department that they considered the case a homicide and would



take it to the grand jury (O.H.T. 129). If that was their position, why wait until nearly one year from the offense to charge Skip? The importance of investigation cannot be overstated. One of the defense experts who testified at trial, Shelby Gallien, noted that on-scene early investigation is crucial to determine the cause of the fire; you cannot rely on the observations and subjective judgments made by others (T. 1303). Failure to charge and the resulting prejudice requires a new trial.

D. The Final Argument Of The Prosecutor Was Improper And Prejudicial And Requires A New Trial.

In his argument to the jury, the prosecutor commented that Skip had been charged by the grand jury. He said, "[a]nd it is the State's evidence and the accusation by the grand jury of this



county that that someone was sitting right here in this courtroom"

(T. 2225). The function and accusation of the grand jury are improper for the petit jury to consider. State v. Williams, 297 Minn. 76, 210 N.W.2d 21 (1973). The prosecutor also impermissibly "invited the jurors to put themselves in the shoes of the victim", State v. Taylor (Minn., filed April 9, 1985), when he stated the following:

When we selected a jury here, there was some talk about jurors having somebody's life in their hands. Well, let me suggest to you that we are talking about five lives. Only one of them had the benefit of the jury.

(T. 2232). The prosecutor also implies by such a statement that Skip Berndt should not be entitled to a trial. The prosecutor impermissibly interjected his



personal feelings of guilt when he stated the following:

I will share my attitude with you about that possibility. I find it impossible to believe he would have run out without trying to help those boys. The investigators experienced with fire and gasoline fumes reached the other conclusion: it would have been impossible for him to do it. If it were possible for him to do it, I find it impossible to believe he wouldn't have gone upstairs to get those children.

(T. 2225). "It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." American Bar Association Project on Standards for Criminal Justice, The Prosecution Function §5.8.

The prosecutor also misstated the presumption of innocence, the burden of proof, and the function of the jury in his final argument. He said, "You have



two directly opposing stories before you, or cases before you. You are going to have to make your decision based on one or the other" (T. 2225). The prosecutor also said that, "We're not talking now about credibility; . . . we're talking about physical evidence . . . not words that you can choose to believe or disbelieve . . . physical evidence . . . as opposed to self-serving claims and words . . . that have their roots . . . in one's believability or credibility" (T. 2227). Such a position says the jury's decision must be based on one version of facts or another. This disregards the function and power the jury enjoys in this state. State v. Cory, 182 Minn. 48, 233 N.W. 590 (1930); State v. Holbrook, 305 Minn. 554, 233 N.W.2d 892 (1975). It also says the defendant is not presumed innocent. It



also implies that the burden of proof is less than reasonable doubt.

The prosecutor continued this strain when he stated that, "If you find or feel that the defendant is not guilty, if you have a doubt about his guilt, you have to have a reason for that doubt" (T. 2234). This misstates the application of the law. It assumes a defendant is guilty and can only be acquitted if the jury can articulate a doubt. The standard is obviously the reverse. A defendant is presumed innocent and can only be convicted if guilt is proven beyond all reasonable doubt.

Finally, the prosecutor encouraged the jury to speculate as to what might have happened in the Berndt household on the night of the fire (T. 2244-2246), to consider Mr. Berndt's sexual indiscretions as to what might have happened (T. 2242), and to believe



without evidence that Mrs. Berndt suffered a blow to her head from Skip Berndt (T. 2257). These and other speculations were dealt with earlier. A jury's verdict cannot be based on speculation or innuendo.

This misconduct was grave. As a result, the Court may affirm only if it finds the error was harmless beyond a reasonable doubt. State v. White, 295 Minn. 217, 203 N.W.2d 852 (1973); State v. Caron, 300 Minn. 123, 218 N.W.2d 197 (1974). The errors require a new trial.



IV.

THE EVIDENCE WAS INSUFFICIENT
TO SUPPORT A CONVICTION.

The standard to review convictions
for insufficient evidence is as follows:

In reviewing a claim of sufficiency of the evidence we must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude that the defendant was guilty of the offense charged The evidence must be viewed in the light most favorable to the prosecution and it is necessary to assume that the jury believed the state's witnesses and disbelieved any contrary evidence"

State v. Ulvinen, 313 N.W.2d 425 (Minn. 1981).

The State's theory is that Skip Berndt planned and intentionally killed his biological son, his two stepsons, and his wife by burning his house with gasoline. Because of the seriousness of the case and gruesomeness of the facts,



appellant believes the usual standard of review is inappropriate. It is appellant's position that in a case of this nature, the jury is so incensed by the facts that they may presume a defendant guilty. The jury exhibits a great fear of acquitting a possibly guilty person and correspondingly exhibits far less concern with convicting an innocent person. Because this may apply in a case of this magnitude, any admission of inadmissible evidence, any speculation by the jury, any prosecutorial misconduct, and any judicial error must be viewed more seriously than in the majority of cases.

This Court tacitly adopted this concept in State v. Ulvinen, supra. In Ulvinen, the defendant was convicted of first degree murder in aiding her son in the murder of her daughter-in-law. The facts included the mutiliation and



dismemberment of the victim while the defendant did not intervene. The Court reiterated the previous standard in determining sufficiency.

However, the Court was quick to recognize that the shocking facts of that case and the defendant's moral liability could cause the jury to convict the defendant in the absence of credible evidence. The Court wrote at page 428:

The jury might well have considered appellant's conduct in sitting by while her son dismembered his wife so shocking that it deserved punishment. Nonetheless, these subsequent actions do not succeed in transforming her behavior prior to the crime to active instigation and encouragement.

Because of the facts of this case, this Court should review the evidence very, very carefully.

The State's witnesses erroneously leaped to the conclusion that the fire was caused by arson. The main reason for



that conclusion was that so much of the house was ablaze when the fire department arrived. Fire personnel said they arrived within five minutes of the call (T. 91). All of the neighbors disputed this estimate and said it was more like 10-20 minutes (T. 229, 283). The neighbors estimate is more realistic. First, Officer Adams arrived before the fire department and he saw Skip using a garden hose to put out the fire (T. 62-65). The neighbor spent some time in just getting the hose (T. 274). Secondly, Officer Adams looked for a ladder. He spent some time looking, including kicking in the door to the maintenance storage (T. 63). Thirdly, Officer Adams said he kept calling the fire department to tell them how serious the fire was (T. 61-62). Finally, Linda Kaui testified that she reported the fire. She said she called the operator



and was put on hold and transferred several times before she got the right fire department (T. 242-244). All of these lead to the belief that the fire had burned for a considerable time before the fire department arrived.

The State believed Skip spread a minimum of five gallons of gasoline throughout his house (T. 930). According to the State, his blood alcohol content was .13% (T. 892). It would seem that if a person with a .13% blood alcohol quickly sloshed five gallons of gasoline throughout his home, he would inevitably get some on him because of the rapidity with which the gasoline was spread. However, no one smelled gasoline on Skip. If he would have taken time so as not to get any gasoline on him, it would have vaporized, the fumes would have been drawn to him, and the home and Skip Berndt would have been no more. However,



the neighbors heard no explosion. The State's own expert, who guessed that five gallons were used, said there is instantaneous combustion of fumes throughout the structure (T. 935). The State's theory makes no sense.

The State's experts said gasoline fires exhibit instantaneous combustion (T. 935). However, the high carbon monoxide levels of the three children were inconsistent with a gasoline fire and consistent with the defense theory of a flashback. The low carbon monoxide level of Mrs. Berndt was consistent with waking up, seeing a fire, and because of her .25% blood alcohol, saying "Oh my God," walking toward the fire and dying of breathing superheated air.

A neighbor of Skip, Charles Catron, crawled into the house over an area the State said contained gasoline. If so, he would have been severely burned or unable

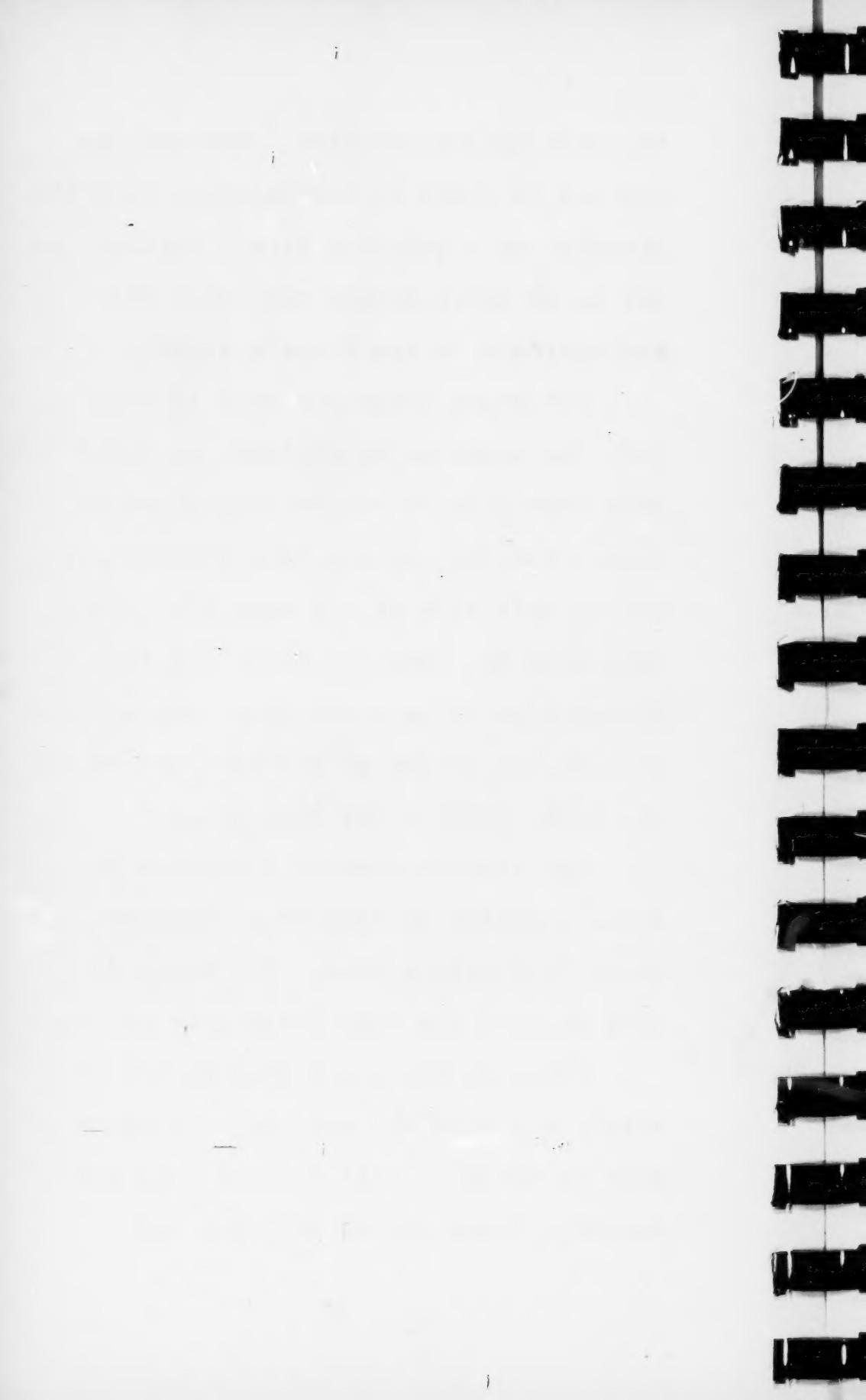


to enter because of fire. However, he did get in which is inconsistent with the presence of a gasoline fire. Further, he got in to where Brenda was lying which was contrary to the State's experts.

The State theorized that if Skip left the house as he claimed, he would have been injured and he complained of none. However, he did have singed hair on the left side of his body (T. 1054), just like Mr. Catron. Also, his feet turned a terrible brown color and all the skin on the bottom of his feet peeled off (T. 1238, 1253) a few days later.

The State's chemist testified he found gasoline in five of 26 samples taken from Skip's home. The worth of that opinion has been dealt with earlier.

Finally, why would Skip Berndt do this? His wife was working. It would make no sense to kill her and lose the income. There was no evidence the



marriage was in trouble. If he wanted to kill his wife, why would he spread gasoline at the doors of his son's bedrooms and down the stairs. The State theorized he did this to trap them (T. 2257). However, the evidence was that he loved them (T. 1114).

From the day the case was charged to the day Skip Berndt was convicted, the facts and the State's theory didn't add up. They still don't. Appellant respectfully asks this Court to reverse his convictions.



CONCLUSION

For the above stated reasons, Skip Berndt respectfully requests that his convictions be reversed.

Respectfully submitted,

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DATED: this 30th day of April, 1985.



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C - Court's Order and Memorandum denying new trial

D - Purge and Trap Gas Chromatography

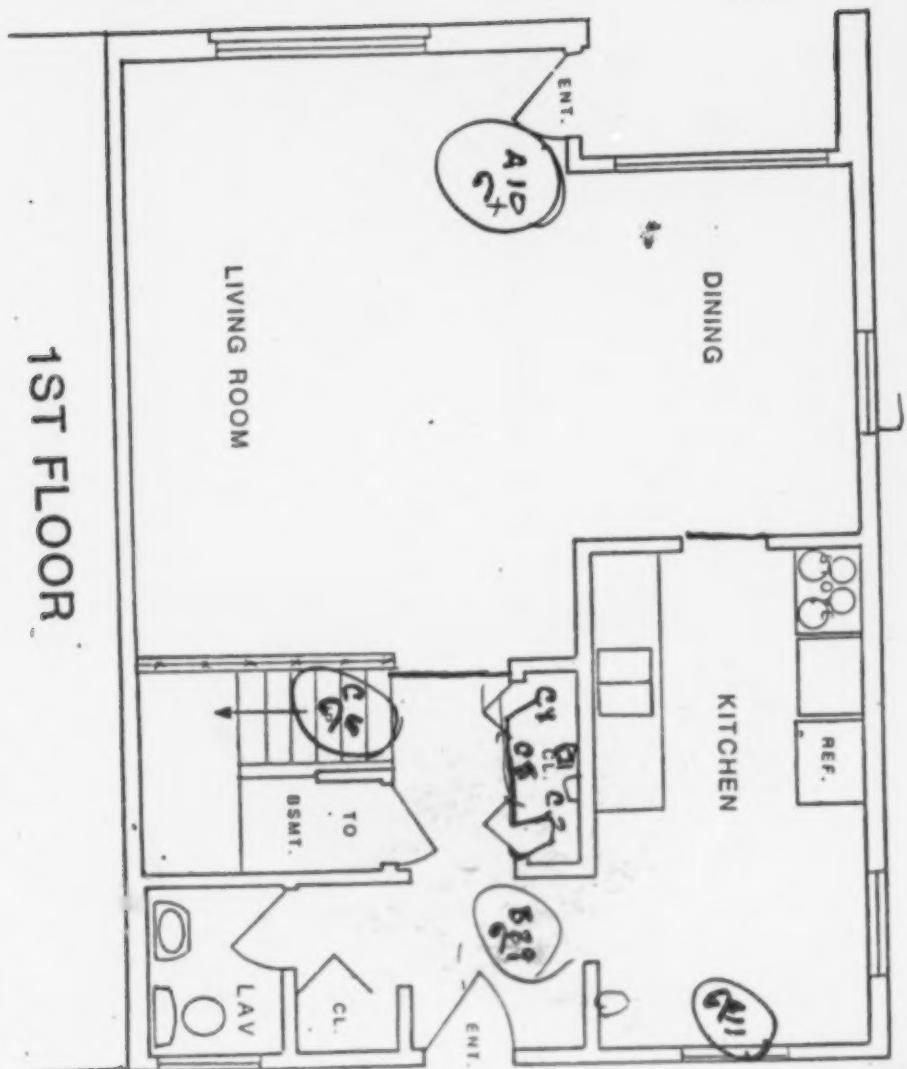
E - Affidavit Supplement To Record

F - Letter of Defense Attorney to Prosecuting Attorney

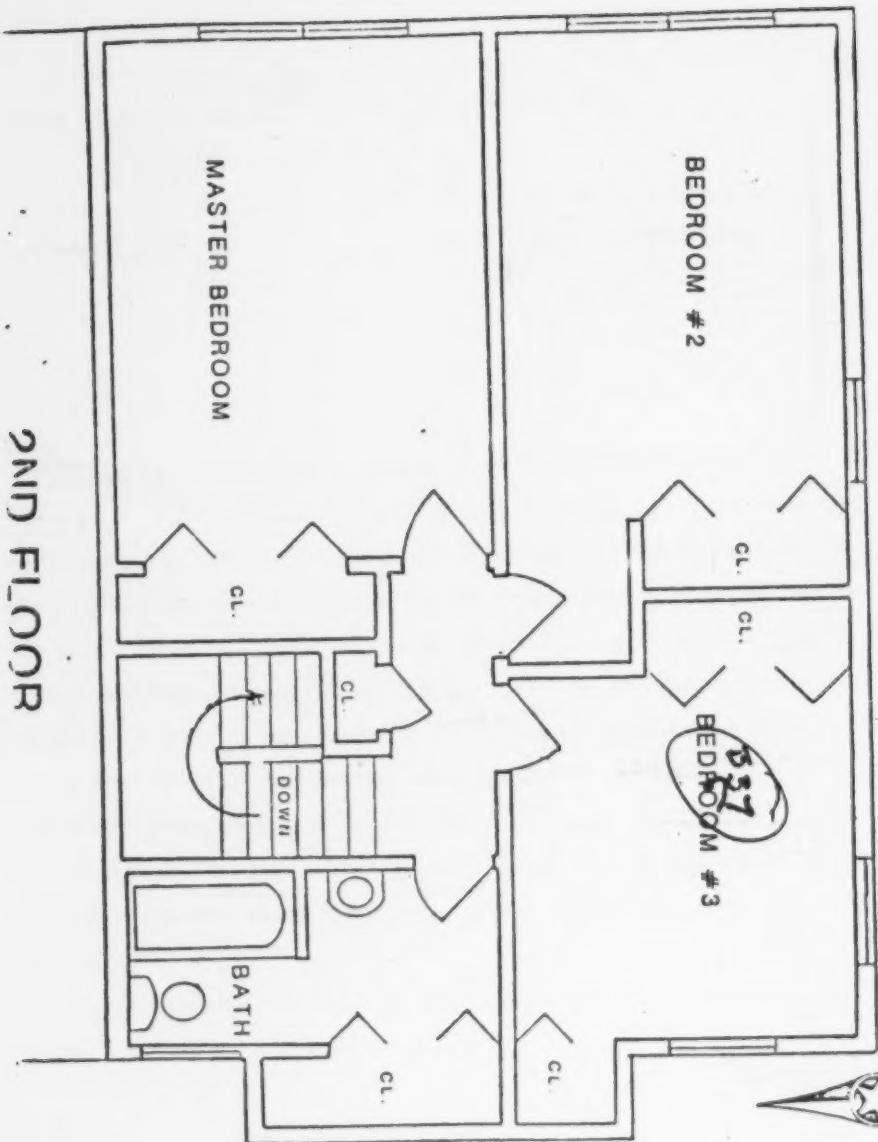
G - Letter of Prosecuting Attorney to Defense Attorney



1ST FLOOR



APPEND



SECOND FLOOR

APPENDIX

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,
vs.
Orville Berndt, Jr.,
Defendant.

ORDER and MEMORANDUM
D.C. File: 80973-01

The above matter came before the undersigned sitting by special appointment as a District Court Judge for determination of post-trial motion brought on behalf of defendant requesting that the court grant a new trial or order judgment of acquittal pursuant to Minn. R. Crim. P. 26.04(1)(l). Said motion was continued from time to time for the purpose of taking testimony of defense expert Robert Davis and conducting the deposition of state expert Rick Tontarski. All necessary transcripts and memoranda were received by the court by July 24, 1984.

Daniel F. Byrne, Esq. appeared on behalf of the State of Minnesota; Craig Cascarano, Esq. appeared on behalf of the defendant.

Based upon the files, records, depositions, testimony, and written memoranda of both counsel,

APPENDIX C-1



IT IS ORDERED:

1. That defendant's motion for a new trial or for judgment of acquittal is denied in its entirety.
2. That the attached memorandum shall be construed as part of this order.

DATED: *August 1, 1987*

By the Court

Doris Ohlsen Huspeni
Doris Ohlsen Huspeni
Acting District Court
Judge by Special
Appointment

APPENDIX C-2



MEMORANDUM

On November 12, 1983, Orville Berndt, Jr. was convicted after a jury trial on eight counts of first degree murder involving the death of his wife, their son, and his wife's two children by a prior marriage.

The trial lasted several weeks. The State's theory was that Berndt poured gasoline throughout the house, ignited the gasoline, and then went outside. The State claimed that its theory was supported by Orville Berndt's unusual behavior at the time of the fire, by burn patterns in the house, by the rapidity of the fire, and by expert testimony that traces of gasoline were found in some physical samples taken from the fire scene. Defendant's motion relates to this last evidence.

At trial the State's expert, Rick Tontarski, testified extensively that gasoline was found in 5 of 26 samples taken from the fire scene. He reached this conclusion by analyzing all 26 samples in a gas chromatograph which produces a graphic representation of a sample called a chromatogram. By matching the sample chromatograms to standard gasoline chromatograms, Tontarski concluded that gasoline was present in 5 samples. These results were disputed by the defense expert, Robert Davis. Davis indicated that the 5 so-called positive chromatograms in fact did not contain gasoline.

Both Tontarski and Davis testified extensively at trial. Both were extensively cross-examined. On the last day of trial,

APPENDIX C-3



Tontarski was recalled for rebuttal testimony. At that time, a State's proposed exhibit (not received) was discovered to be a chromatogram which had not been made available to defendant through discovery. Tontarski had, in fact, made more than one chromatogram for each of the 5 samples in which he had identified gasoline. The additional chromatograms were in his Maryland laboratory. Prior to trial, he had turned over to the defense one chromatogram for each positive sample. Nothing relating to the additional chromatograms was admitted into evidence at trial. Pursuant to a post-trial motion, all positive chromatograms were produced for the defense.

Defendant's motion raises two issues:

1. Whether there was a Rule 9 violation and, if so, would it mandate a new trial.

2. Whether the additional chromatograms are newly discovered evidence that requires a new trial.

1. Reports of examinations and tests are discoverable by the defendant without court order:

The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any results or reports of . . . scientific tests, experiments or comparisons made with the particular case.

Minn. R. Crim. P. 9.01(1)(4). Throughout the discovery stage of this case, the defense requested Tontarski to produce only



chromatograms regarding the five positive samples. Discovery of chromatograms taken from the 21 negative samples has never been an issue and is not an issue in this motion. The defense claims that it was unaware that more than one chromatogram was made for each positive sample. Tontarski insists that he informed the defense at some point during discovery that more than one chromatogram existed for each positive sample. Prior to trial, Tontarski turned over to the defense the one chromatogram for each positive sample that he relied upon for making his identification of gasoline. The other positive chromatograms, while of assistance to Tontarski and while reflecting the presence of gasoline, were merely preparatory to insure the right sample volume, select the right amplification setting, or determine the need for clean-up procedures.

Discovery requests between the defense and prosecution were not in writing. Therefore it is difficult to determine whether the discovery request necessarily encompassed all chromatograms showing evidence of gasoline, or only those 5 chromatograms that Tontarski relied on for his opinion. In any event, there was no bad faith on Tontarski's part in not turning over all the chromatograms.

Rule 9 itself is not helpful in determining the extent of Tontarski's obligation to produce, but the principles underlying that rule lend guidance. Discovery is intended to give:



BEST AVAILABLE COPY

both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial.

State v. Schwantes, 314 N.W.2d 243, 245 (1982). In Schwantes, the court reversed a conviction because the prosecutor failed to disclose evidence it had before trial that was used to impeach the defendant's alibi.

This case is very different. Before trial, the defense was equipped with Tontarski's conclusions and with the underlying information on which he relied. The preliminary chromatograms shed no appreciably brighter light on either his technique or on his ultimate opinions. Unlike Schwantes, any potential surprise here was minimized by keeping the additional chromatograms out of evidence. (The prosecutor did not use the information to his advantage.) In fact, it was the prosecutor who was responsible for calling the entire matter to the court's attention. Trial preparation was not seriously intended. The defense was not prejudiced.

Even if Rule 9 were violated, it would not necessitate a new trial, especially since the failure to disclose was in good faith and was nonprejudicial. See, State v. Daniels, 332 N.W.2d 172 (Minn. 1983). To avoid these issues in the future, no doubt the better procedure would be to put requests in writing.

2. To justify a new trial, newly discovered evidence must be of a sort that could not have been discovered before trial by



due diligence and that would materially have affected the outcome of the trial. State v. Meldahl, 310 Minn 136, 245 N.W2d 252 (1976); Minn. R. Crim. P. 26.04(1). The defense arguments do not meet this standard.

At the post-trial hearing, Davis testified that the additional chromatograms showed that Tontarski's technique was unreliable, that Tontarski was operating without standards, that ordinary building compounds were incorrectly considered, and that he believed Tontarski's samples were contaminated. Davis also expressed the concern that the additional chromatograms did not closely resemble the chromatograms that were supplied in pre-trial discovery.

Virtually all of these matters were exhaustively dealt with at trial. The question of standards, specifically a carbon disulphide standard, was explicitly raised at trial. Moreover, at his deposition Tontarski showed that his file on the case in fact contained that standard. Davis' concerns about contamination arose chiefly from the fact that sample containers were punctured to "purge and trap" the contents. He argued that puncturing may have introduced foreign elements into the samples. These punctures were quite noticeable in the containers during trial, so the contamination argument was available to Davis at that time. In any event, Tontarski testified at his deposition regarding the safeguards taken to

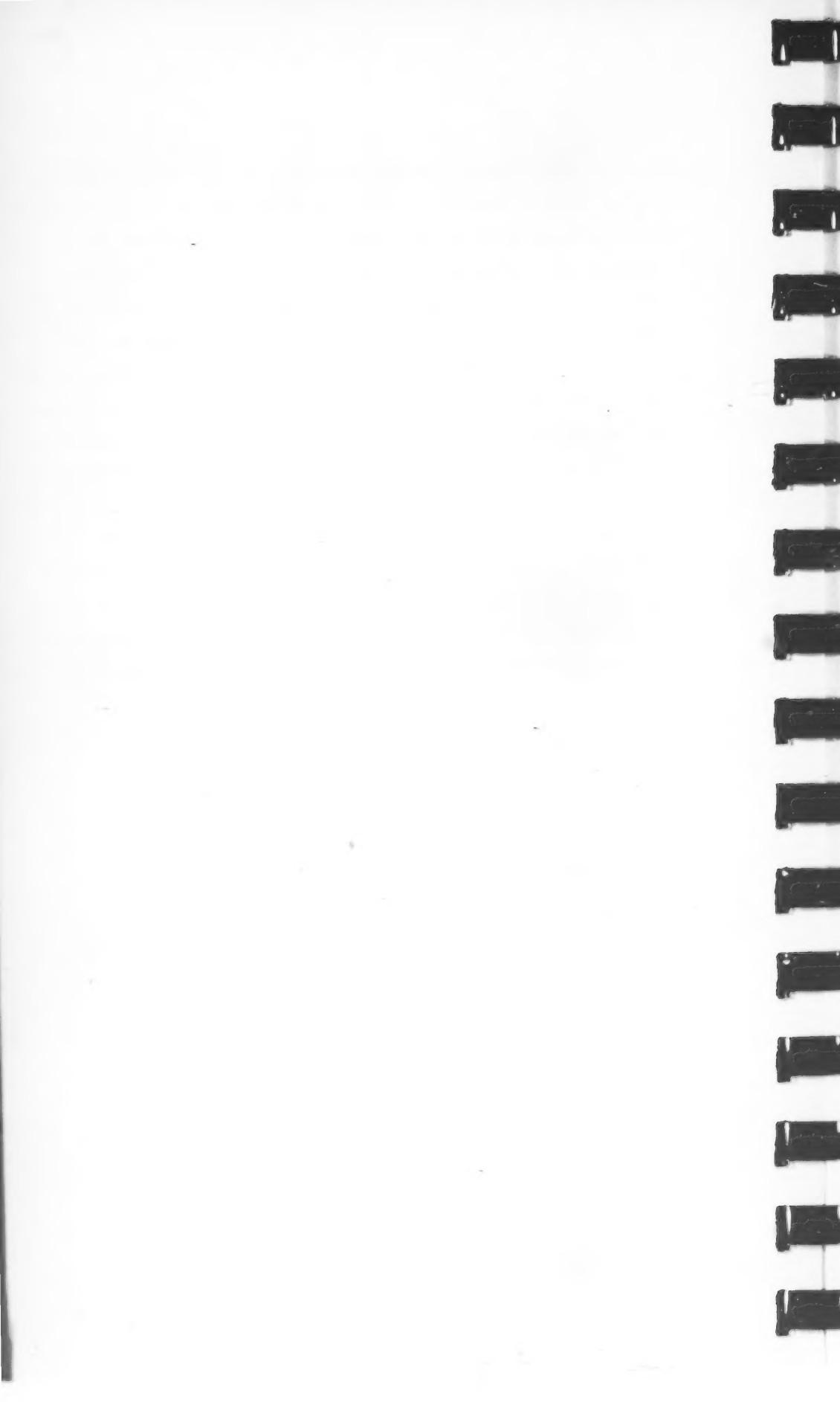


protect the integrity of the samples. The fact that Tontarski ran no control samples of building compounds in the house, such as carpeting, also was an issue before the jury. The one concern most directly related to the belated discovery of additional chromatograms was that they did not match the chromatograms which were turned over to the defense before trial. At his deposition, Tontarski explained that this was to be expected since in many instances his equipment was adjusted or the sample was cleaned of impurities to permit more accurate identification. These adjustments and cleansings would change the shape of the graph in each chromatogram.

The post-trial discovery of additional chromatograms provided no significant opportunities for cross-examination of Tontarski that did not exist at trial. Their disclosure before trial would not have made a material difference to the outcome. For these reasons, the defendant's motions are denied.

D.O.H.

APPENDIX C-



PURGE AND TRAP GAS CHROMATOGRAPHY

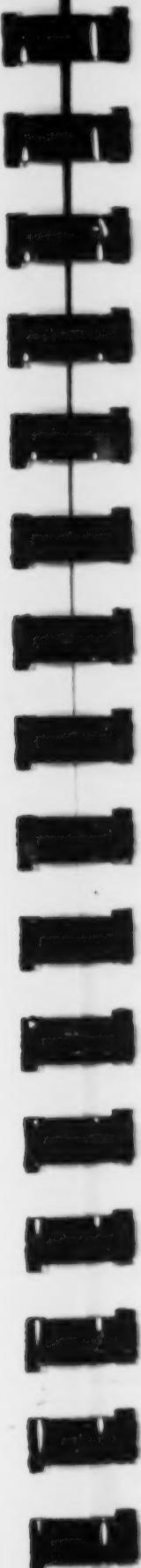
The purge and trap technique is a method of analysis used to detect the presence of accelerants (primarily petroleum-based products used primarily to promote a fire faster, such as gasoline, kerosene, fuel oil, etc.) in a given material. In purge and trap, the chemist takes the container, in this case an ordinary, unused paint can with a sealed lid, and places a trap tube containing charcoal into the lid. The chemist then punches a hole in the side or bottom of the can and fits a cylinder of carrier gas into it. Both procedures of inserting the trap and the carrier gas, must be done so that outside air does not enter the container. The chemist then turns on the carrier gas, nitrogen or helium or something else that will not interfere with the results of



the chromatogram. The carrier gas is forced through the sample and into the charcoal trap. The hydrocarbons from the can get trapped in the charcoal. It is mandatory that nothing be introduced into the can except the carrier gas. The charcoal trap is then rinsed with a solvent. The solvent will "pick up" the hydrocarbons. The solvent is then injected into a chromatograph. The chemist must know what the solvent is so that its presence can be identified on the resulting chromatogram and ruled out as having come from the same (M.T. 6-9). The hydrocarbons in the sample will appear on the chromatogram. This graphic illustration consists of peaks and valleys. The shape of the peak, and the area contained under the peak, and the time at which the peak appears all assist the chemist in determining the substance represented by those hydrocarbons. In



arriving at that determination, the chemist compares the unknown chromatograms with known chromatograms called standards.



STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

vs.

ORVILLE BERNDT, JR.,

Defendant.

AFFIDAVIT IN SUPPLEMENT
TO RECORD

D.C. File 80973-01
C.A. File No. 82-1950

STATE OF MINNESOTA
) ss.
COUNTY OF HENNEPIN)

CRAIG CASCARANO, being first duly sworn, upon oath states as follows:

1. That affiant was trial counsel for the above-named defendant;
2. That affiant requested from the prosecution all the chromatograms which allegedly showed the presence of gasoline;
3. That prior to trial, affiant had at least four telephone conversations with Mr. Richard Tontarski, the State's chemist, the purpose of which was to acquaint affiant with Mr. Tontarski's methodology and scientific conclusions;
4. That affiant asked Mr. Tontarski specific questions concerning the chromatogram and his standards;
5. That affiant, on at least two occasions, asked Mr. Tontarski if affiant had all of the chromatograms that showed the presence of gasoline;
6. That affiant asked Mr. Tontarski, "What, if anything you would surprise me with at trial?";

APPENDIX E-1



7. That Mr. Tontarski said that affiant had all the positive chromatograms and that there would be "no surprises";

8. That Mr. Tontarski never, in any of the conversations, revealed to affiant that there were multiple chromatograms of each sample in which Tontarski believed gasoline was present;

9. That the day the testimony concluded, Robert Davis, the defense chemist, and affiant went to the prosecutor's office to review a proposed exhibit;

10. That the exhibit was an enlargement of a chromatogram that allegedly showed the presence of gasoline;

11. That, in fact, the exhibit was an enlargement of a chromatogram that was never disclosed to affiant;

12. That at the meeting with the prosecuting attorney, the State's chemist, the defense chemist and affiant, neither the State's chemist nor the prosecuting attorney disclosed the existence of additional positive chromatograms;

13. That affiant placed the above-mentioned facts in the trial record on or about November 10, 1983;

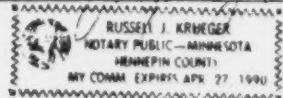
14. That affiant spoke with the court reporter, and was informed that the notes have been misplaced. As a result, the above facts were not in the trial record.

Further affiant saith naught.

Craig D. Cacan
Craig Cacan

Subscribed and sworn to before me
this 26th day of April, 1985.

Russell J. Krueger



APPENDIX E-2





OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487
(612) 348-7530



William R. Kennedy, Chief Public Defender

July 10, 1984

Mr. Dan Byrne
Assistant County Attorney
C-2100 Government Center
Minneapolis, MN 55487

Dear Mr. Byrne:

I have read your Memorandum and by this letter request that corrections be made with regard to the facts outlined.

On page 8, you indicate that the disclosure of the preparatory chromatograms was made in the closing stages of the trial. If you recall, the chromatograms were never disclosed until after post-trial motions and orders were signed by the Trial Court. It was only the existence of the additional chromatograms that was disclosed during the rebuttal stage of the trial.

In addition, you indicate on page 6 that absolutely nothing prevented the defense from pursuing, both prior to trial and at trial, that which it now claims to be significant. Again, it is my distinct recollection that there was no knowledge, either on your part or mine, of the existence of the undisclosed chromatograms. It was only learned during the rebuttal stage of the trial of the existence of undisclosed chromatograms. I would ask you to recall not only the surprise, but the astonishment, both on your part and mine, when it was learned that there were existing chromatograms that were not disclosed. If, therefore, there was no knowledge of its existence, clearly the defense could not proceed and investigate that which it now claims would be significant.

On page 9, you indicate that no continuance was sought nor motion made when the existence of preparatory chromatograms became known. Again, it is my distinct recollection, consistent with my notes to the file, that an extensive record was made. It was in-

HENNEPIN COUNTY

an equal opportunity employer

APPENDIX F-1



Page 2
July 10, 1984

dicated to the Court that we were two (2) hours from the end of a six week trial, the chromatograms were located in Maryland and not readily available for investigation or review, and therefore the only appropriate motion would be a post-trial motion if there was a conviction. It is also my distinct recollection the Court agreed.

If these corrections are consistent with your recollection, I would ask you to notify Judge Huspeni.

Cordially,

Craig Cascarano
Assistant Public Defender

CC:ls

cc: Judge Huspeni

APPENDIX F-2



THOMAS L. JOHNSON
COUNTY ATTORNEY

(612) 348-3091



OFFICE OF THE HENNEPIN COUNTY ATTORNEY
2000 GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487

July 23, 1984

Craig Cascarano
Assistant Public Defender
C-2200 Government Center
Minneapolis, Minnesota 55487

RE: Orville Berndt, Jr.

Dear Craig:

After our recent discussion, I thought it appropriate to respond to your letter of July 10th. As to your first point, your suggestion is well taken. It is clear that it was the existence of the preparatory chromatograms that was disclosed in the closing stage of the trial and not the disclosure itself that occurred at that time.

As to your objection to the material on page 6, I can only say that it appears you have misread it. The material in the paragraph to which you object refers back to the preceding paragraph. That is to say, the preceding paragraph referred to page 2 of your memorandum, in which you outlined three areas of interest in your post-trial motion. It is my argument that nothing prevented you from pursuing those areas of interest both prior to trial and at trial. I did not mean to argue that you could have pursued any interest you had in the preparatory chromatograms since it is your position that you were unaware of them. I hope this clarifies that concern.

As to your objection to page 9, I simply say that I found it necessary to discuss as briefly as I did the absence of a motion when the existence of the preparatory chromatograms was known simply because the Lindsey case (State v. Lindsey, 284 N.W.2d 368, Minn. 1979) requires a consideration about a continuance. The Lindsey case cites "the feasibility of rectifying that prejudice by a continuance" as one of the considerations which a trial court must consider in exercising its discretion. I could hardly discuss the Lindsey case and ignore that aspect of it.

Sincerely,

Daniel F. Byrne
DANIEL F. BYRNE
Assistant County Attorney

DFB:br

cc: Honorable Doris Huspeni

HENNEPIN COUNTY IS AN AFFIRMATIVE ACTION EMPLOYER

APPENDIX G

No. 86-704

⑥
Supreme Court, U.S.

FILED

NOV 26 1986

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

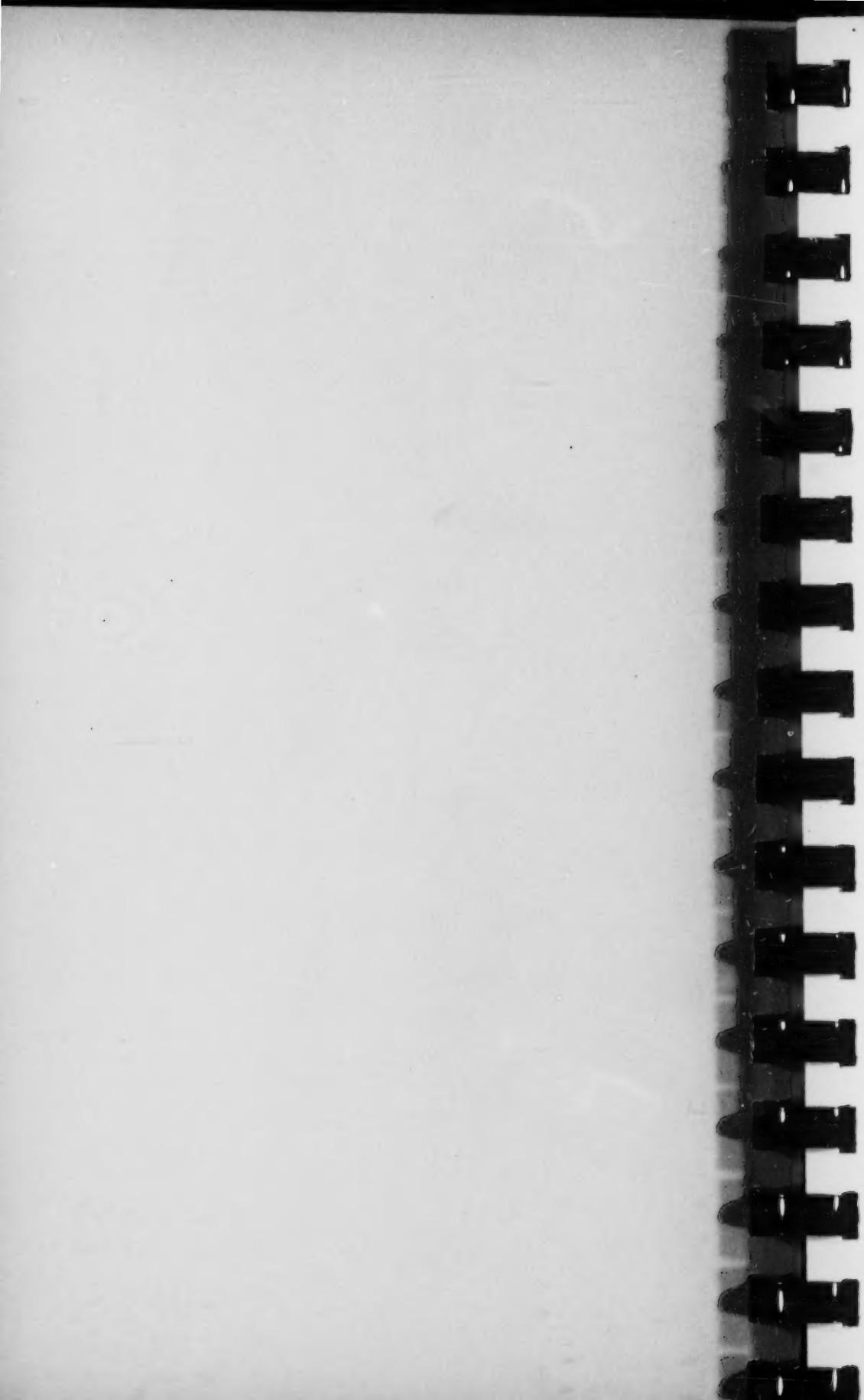
ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

RESPONDENT'S APPENDIX,
PART II

WILLIAM R. KENNEDY
Chief, Hennepin County
Public Defender

DAVID H. KNUTSON
Assistant Public Defender
C-2200 Government Center
Minneapolis, MN 55487
(612) 348-7530

Counsel for Respondent



C2-84-1661

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION
FOR REHEARING AND APPENDIX

WILLIAM R. KENNEDY
Hennepin County Public Defender

DAVID KNUTSON
(Atty. Lic. No. 57058)
Assistant Public Defender
Attorneys for Respondent
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Minneapolis, MN 55487
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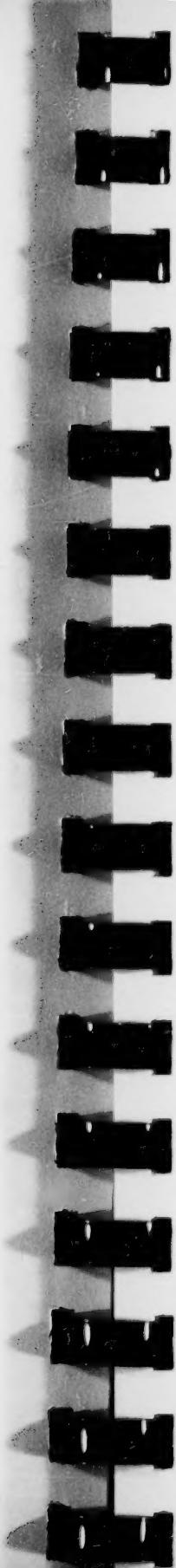


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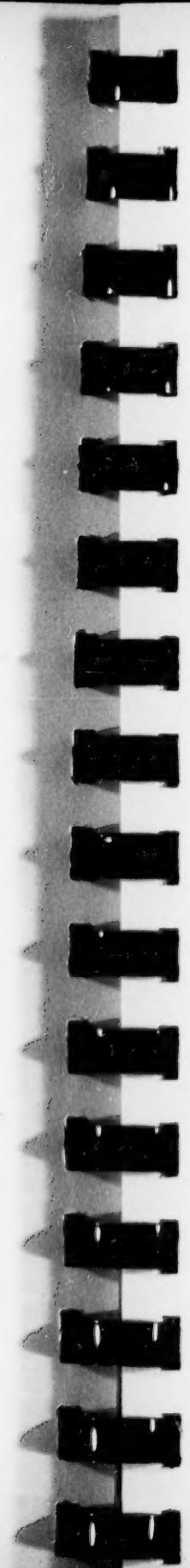
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INTRODUCTION

Skip Berndt is innocent; the County Attorney is not. The State is unhappy with this Court's decision. The State alleges that this Court was wrong when it reversed the convictions because they were based on insufficient evidence. The County Attorney should be ashamed of the position taken in this proceeding. The State has sought to destroy this Court's impartiality and integrity by retrying the case to the press. The State has deluged this Court with material outside the record for no good reason. The State has advanced a most spurious argument that because it filed a petition for rehearing, Skip Berndt should be reincarcerated. The State alleges that this Court did not mean what it said or understand and appreciate the gravity of its decision. Such arrogance can only

occur through the unbridled use of power. A response without anger is nearly impossible; no response is unthinkable and unforgivable. The allegations of the State will be dealt with as follows:

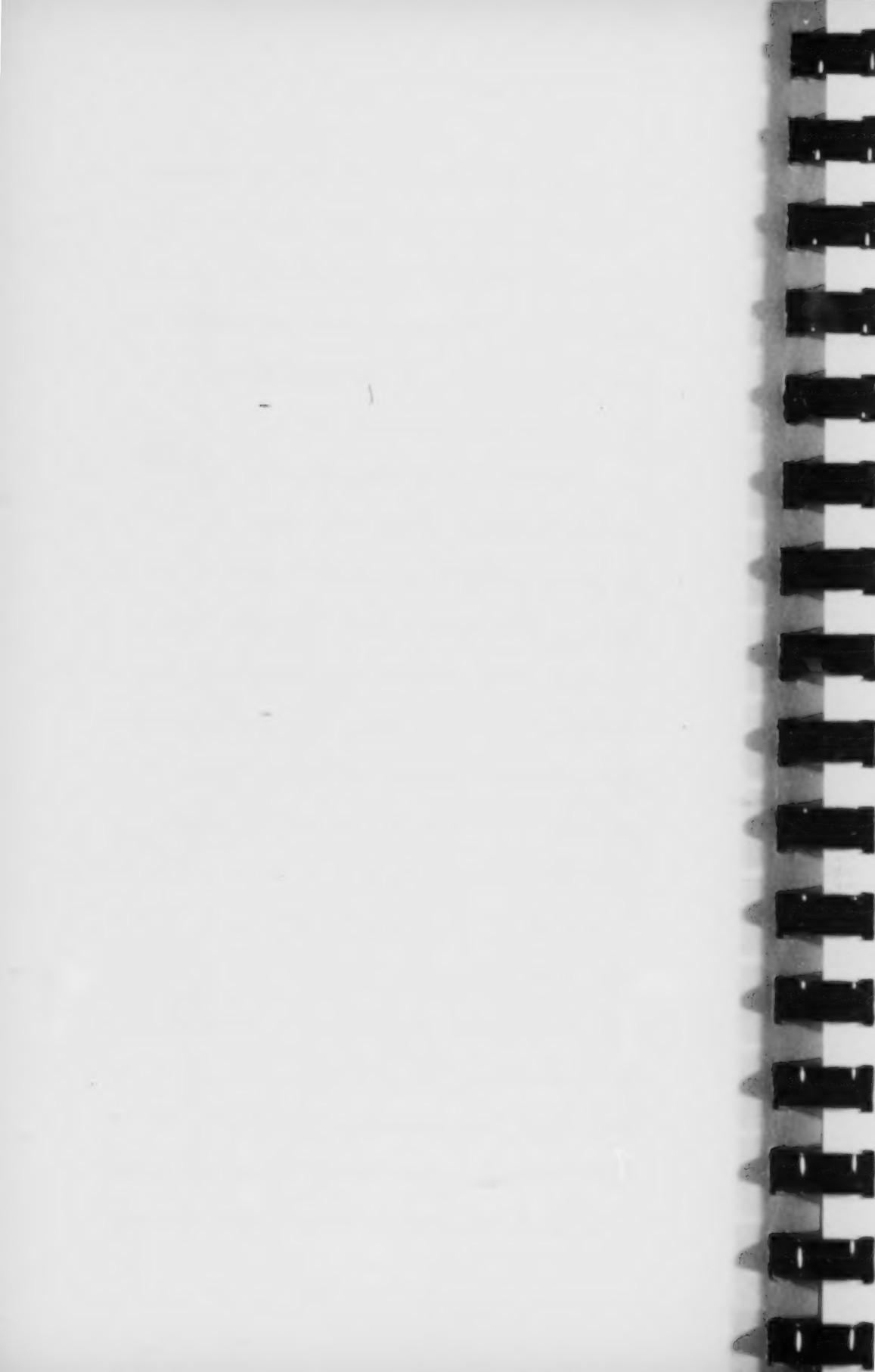
First, a reversal of a conviction for insufficient evidence, like a finding of not guilty, is not reviewable. Double jeopardy attaches upon the Court's pronouncement of reversal and not on the filing of the judgment. Consequently, a petition for rehearing does not affect the force of that decision. The case cited by the State reversed a conviction for reasons other than sufficiency and is therefore inapplicable.

Second, this Court was correct in reversing the convictions. The evidence was insufficient. Skip Berndt has maintained his innocence from the day of the fire. He will maintain his innocence until he dies. Any "errors" in the



Court's recitation of the facts in its decision are minor and unimportant. The State is simply "nitpicking" this Court's decision. "Errors" can be found in anything which is subjected to microscopic examination.

Third, Skip Berndt has maintained his innocence from the day of the fire. He will maintain his innocence until he dies. The State has included material outside the record to convince the Court, the public, or both, of the opposite. The prison inmate is not worthy of belief. He has taken an alleged statement, ambiguous at best, and turned it in to a confession one year later. The statement the inmate gave in his affidavit and the one he said to the prison official are totally contradictory and show how the "confession" was fabricated. The State also included a libelous attack on Professor Shelby



Gallien, the man honored by the National Association of Fire Investigators as their 1985 Man of the Year for his life-long contributions to the field. Mr. Gallien is unable to defend himself because he has suffered a series of strokes which have left him blind, bedridden, and without mental faculties. The State also includes material from a case where this Court upheld an arson-murder conviction. That case has no relationship to this one. In that case, the defendant hated the decedent, had numerous physical fights with decedent's mother, was observed starting the fire and admitted such before, during, and after the fire. The County Attorney knows that all of this material was improperly placed before the Court.

Finally, the State wants relief because it believes some trial exhibits were not physically taken to the Supreme

Court. Counsel should have ensured delivery or included copies in its appendix. Counsel cannot cite its own failure to perform as a reason for a rehearing.

Accordingly, the Petition for Rehearing should be denied.



ARGUMENT

I.

THE PETITION FOR REHEARING
SHOULD BE DENIED BASED ON
MINNESOTA CASE LAW AND THE
DOUBLE JEOPARDY CLAUSES OF THE
MINNESOTA AND UNITED STATES
CONSTITUTIONS.

A. The Protection Of The Double
Jeopardy Clause Cannot Be
Avoided By Staying The Filing Of A
Judgment.

Skip Berndt's convictions were reversed by this Court on March 21, 1986. This Court reversed because the evidence was insufficient to sustain the convictions. The Court held in a unanimous en banc decision:

On appeal, Berndt claims that the evidence was insufficient to sustain the convictions. We agree. Accordingly, we reverse.

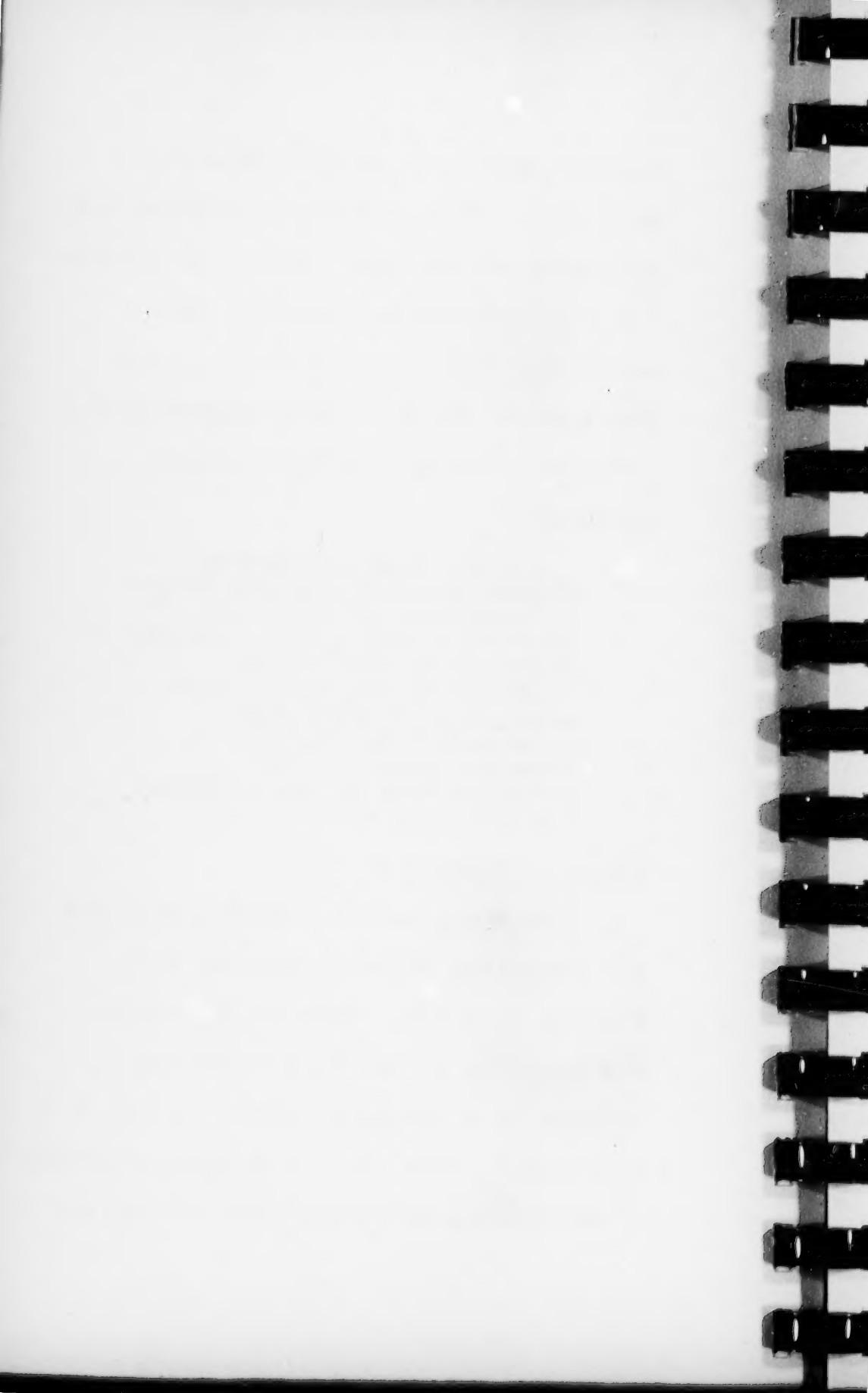
The State's petition suggests that Tibbs v. Florida, 457 U.S. 31 (1982), holds that "an appellate court's finding of insufficiency is still subject to

further appellate review" (State's Petition). That statement is wrong and purposely misleading. Tibbs' conviction was not reversed for insufficient evidence. The United States Supreme Court wrote the following regarding the issue of reversal for insufficient evidence:

. . . the Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial. A reversal based on the insufficiency of the evidence has the same effect

Tibbs v. Florida at 41.

The State contends that a petition for rehearing voids or negates this Court's decision. That is incorrect. The petition of the State confuses "effect of a judgment" with "filing of a judgment." This Court has never extended or withheld a constitutional protection



based upon the performance or nonperformance of a ministerial act such as the filing of a judgment. To do so would exalt form over substance.

However, that is precisely what the State urges this Court to do.

The Illinois Appellate Court considered a similar issue when a criminal defendant moved the court for a directed verdict. After arguments, the court directed a not guilty verdict on one count. The prosecution moved the court to reconsider and the court withdrew the directed verdict. The appeals court held that double jeopardy prohibits the judge from withdrawing his verdict once it is announced.

"[W]e conclude that the validity of a court's pronouncement of a directed verdict does not depend upon whether judgment of acquittal is entered. We conclude that the announcement that the verdict is directed for defendant is sufficient to bar



further prosecution
The rendition of judgment is a
judicial act, 'while the entry
of judgment by the clerk is a
ministerial act'. (citations
omitted)."

People v. Stout, 438 N.E.2d 952, 955

(Ill. App. 1982).

Similarly, the court in a Maryland
bench trial made a finding of guilty on
one charge and not guilty on another.
The prosecutor immediately argued that
the not guilty decision was incorrect and
convinced the court to change the
decision and make a finding of guilty.
The Maryland Court of Appeals reversed.

It is therefore settled that
once the trier of fact in a
criminal case, whether it be
the jury or the judge,
intentionally renders a verdict
of 'not guilty,' the verdict is
final and the defendant cannot
later be retried on or found
guilty of the same charge.
And, contrary to one of the
arguments advanced by the State
in the present case, it is not
necessary that final judgment
be entered on the docket.

. . . The trial judge's initial statement of 'not guilty' . . . was not inadvertent or a slip of the tongue . . .

Once a trial judge intentionally renders a verdict of 'not guilty' on a criminal charge, the prohibition against double jeopardy does not permit him to change his mind.

Pugh v. State, 319 A.2d 542, 545 (Md. 1974). Therefore, the State cannot avoid the legal consequence of this Court's decision by the mere filing of a petition for rehearing.

A reversal based on insufficient evidence is a finding of not guilty and puts an end to the case. The United States Supreme Court grants absolute finality to reversal of a conviction for insufficient evidence. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978). Burks moved the trial court for a judgment of acquittal before submission to the jury. After he was convicted, he moved the trial court for a new trial on



the ground of insufficient evidence. The trial court denied the motion as 'utterly without merit.' Burks, at 2143. Burks appealed and the Court of Appeals agreed with Burks that the evidence was insufficient and reversed. The Court of Appeals remanded to the trial court to determine if an acquittal should be entered or a new trial ordered. The Supreme Court of the United States held that remand was inappropriate:

Since we necessarily afford absolute finality to a jury's verdict of acquittal -- no matter how erroneous its decision -- it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty The purpose of the clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.'

Burks, at 2150.

It is clear that this Court reversed

Skip Berndt's convictions on the grounds of insufficient evidence. First, the Court stated so. Second, the Court in footnote 1 of the opinion stated that, "In addition to raising the insufficiency of the evidence issue, appellant has alleged violation of discovery rules, an unconstitutional search, and deprivation of a fair trial. Our disposition makes it unnecessary to address those issues." And thirdly, the court did not remand for a new trial as it would have if it had based its decision on trial errors. Consequently, pursuant to Rule 28.02, subd. 12, Minn. R. Crim. Proc., and Minn. Stat. §632.06, Skip Berndt was absolutely discharged as a result of this Court's decision.

The position of the State is that this Court erred in the decision. The State is wrong factually because this Court was correct: the evidence was



insufficient and the convictions were based on mere speculation (See II, infra). The State is wrong legally because their argument is irrelevant. Reversals for insufficient evidence and not guilty findings are simply not reviewable.

In State v. Abraham, 335 N.W.2d 745 (Minn. 1983), defendants were charged with selling intoxicating beverages to minors. The defendants waived a jury and alleged the defense of entrapment. The trial court held that the State failed to prove predisposition of the defendants to commit the crimes. The State sought a pre-trial appeal on grounds of erroneous factual findings and application of the law. This Court dismissed the appeal as barred by the double jeopardy clause, stating:

It is strongly argued that the trial court erred in determining that the defendants



were entrapped. However, we do not decide this issue because of our holding that the double jeopardy clause bars the state's appeal.

We base our holding that the state's appeal is barred on the decision of the United States Supreme Court in United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978).

The general rule applied in Scott is that 'a judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution'

It is the decision of the Court which reverses the convictions because they were based on insufficient evidence that controls and therefore terminates the proceeding. The formal filing of the judgment is irrelevant. In State v. Abraham, the State advanced a similar argument to the one presented here. This Court answered with the following passage from United States v. Scott:



The fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination, but it does not alter its essential character.

Abraham at 748. Consequently, under Abraham, Burks and Scott, a reversal based on insufficient evidence terminates the prosecution. The fact that the State believes the decision wrong is immaterial.

In Tibbs v. Florida, relied on by the State, Tibbs was convicted and appealed to the Florida Supreme Court. The Court reversed the conviction. The plurality opinion of that Court "concluded that the 'interests of justice' required a new trial." Tibbs v. Florida, at 36.

The United States Supreme Court affirmed and held that a reversal and remand in that case were permissible.



But more importantly, the Court reiterated, contrary to the State's position, that:

" . . . the Double Jeopardy Clause precludes retrial 'once the reviewing court has found the evidence legally insufficient' to support conviction.

Tibbs v. Florida, 457 U.S. at 40.

Regardless of whether an acquittal has been filed, the State cannot appeal from an acquittal.

Where the court, before the jury returns a verdict, enters a judgment of acquittal . . . appeal will be barred only when 'it is plain that the district court . . . evaluated the Government's evidence, and determined that it was legally insufficient to sustain a conviction'" (citation omitted).

United States v. Scott, 437 U.S. 82, 97 (1978).

In sum, this case has been in the post-trial and appellate proceedings for almost 2-1/2 years. This Court was

generously liberal in giving counsel for both sides extra time within which to prepare the appellate briefs. The Court received the briefs and set oral argument approximately four months later. Counsel for both sides were given ample opportunity to present their views at the oral argument. This Court then deliberated four months before announcing its decision. To suggest that this Court didn't appreciate the gravity of its decision or didn't consider testimony of record is insulting. The State has no right to a rehearing. A rehearing should be denied because this Court's decision was correct. The State simply wants a "second bite at the apple."

B. A Petition For Rehearing Should Be Denied When The Issues Raised In The Petition Were Discussed By Petitioner In Its Appellate Brief And Oral Argument.

Rule 140.01 of the Minnesota Rules of Civil Appellate Procedure provides for

rehearings. That rule had its genesis over one hundred years ago in Derby v. Gallup, 5 Minn. 119 (Gilfillan 85, 1860). In that case, appellant did not prevail on appeal and petitioned for rehearing. The reasoning of the court is instructive and relevant to this proceeding. The reason requesting a rehearing was stated as follows:

The application is based upon an affidavit of the counsel for the appellants, setting forth, in substance, that upon the argument of the cause . . . owing to an intimation of a member of the court, the counsel did not argue an important point in the case . . . That, in the decision of the case, the court held against the view entertained by the counsel, and, as he believed, the decision on that point (as well as others) was erroneous.

Derby v. Gallup at 104. The Court held that what is argued and the manner in which it is argued is the responsibility of counsel. The Court observed: " . . . counsel must argue their causes as fully

as they may be advised is necessary."

Derby v. Gallup at 105.

In denying the motion for rehearing, the Court held:

But where a question of law has once been fully discussed on the argument, and considered by the court, we cannot admit that a party is entitled to a reargument, on the ground that there is a manifest error in the decision. We are not aware that any court has sanctioned such a practice, and it would be attendant with inconveniences and evils far overbalancing the advantage accruing in the particular instance.

Derby v. Gallup at 105 (emphasis added).

More recently, the following sentiment has been written concerning a rehearing:

Minnesota Rule of Civil Appellate Procedure 140 is not intended to provide a party with one last chance to present arguments already rejected by the Court. The proper use of a petition for rehearing was described in Derby v. Gallup .
 . . .



3 Minn. Pract. App. Rules Annot., 2d Ed.
486.

The State's position simply is that it disagrees with this Court's decision. That does not justify a rehearing. All of the reasons advanced in the petition were raised by the parties in the briefs and many were specifically inquired into at the oral argument. The State's petition should be denied.



II.

THE PETITION FOR REHEARING
SHOULD BE DENIED BECAUSE THE
DECISION IS CORRECT AND THE
STATE IS MERELY REPETITIOUSLY
REARGUING ITS CASE.

The Court reversed for insufficient evidence. The State failed to prove Skip Berndt guilty beyond a reasonable doubt. The State's petition is no more than a nitpicking rebuttal to the Court's decision and a reargument of issues previously rejected. The following are some of the "errors" alleged by the State. The petition discusses at great length the Court's finding that the State's chemist concluded that an accelerant was most probably gasoline when he testified it was gasoline. Or the fact that a neighbor and Skip Berndt came out of their respective homes at the same time even though the neighbor did testify that he concluded that they came



out of their homes at the same time (T.255). Or that Officer Adams didn't see the second floor on fire when he arrived when, in reality, Officer Christman testified that she didn't see the second floor on fire until after she arrived (T.82). Or that Berndt yelled for the fire department when he ran out his house when he actually yelled for the fire department and that his wife and kids were inside after he was outside (T.186). Or that the court found that Adams and Berndt searched for a ladder when actually Adams looked for a ladder and Berndt previously asked a neighbor to get a ladder and was told there was no ladder available (T.276). One of the neighbors said either Berndt or a neighbor asked for a ladder (T.184). The "errors" cited by the State are pedantic and inconsequential. To show the lack of proof, the Court wrote that even assuming



gasoline was present in the five chromatographically positive areas, the State did not meet its burden. The State is wrong in assuming that the Court accepted the hypothesis that the areas of suspicion contained gasoline. The Court only wrote that to show that there was no connection between Skip Berndt and gasoline. Accordingly, the entire argument of the State regarding the gasoline is misplaced and misleading.

As further support for its petition, the State engages in the same speculation that the Court rejected in the opinion. First, the Court rejected the "motives" of financial gain and womanizing as unproven and purely speculative. The State says the Court was in error when it wrote that Berndt was unaware of his wife's life insurance through work. The State directs the Court to the transcript of the omnibus hearing as rebuttal.



However, that testimony was not before the jury and the testimony was that Skip Berndt didn't know about any insurance (T.118), but suggested that there may be some at work. It is fair to conclude he didn't know because he said so, he was not a named beneficiary (T.706), the policy had been in effect since 1978 and no increase in coverage was ever requested (T.707,709). The policy was no more than a burial policy. The Court correctly concluded that Berndt was unaware of the credit life insurance covering the purchase of a used car (T.1244,1254). The State advanced the motive of financial gain, the State had to prove it with competent evidence. The State failed.

Even if one accepts a financial motive for murder, that motive cannot be extended to the boys. The State suggests



in the petition that Skip "may have concluded that if the boys also perished," Brenda's death would look more natural. This is the same type of speculation the State asked the jury to engage in. It is undisputed that Skip loved all three boys. The youngest insisted on sitting on Skip's lap for dinner when the extended family gathered at holidays. He coached the older boys in little league and had just bought them new bicycles for their birthdays (T.1206). There was no motive to kill the boys. But such a motive was integral to the State's theory.

The State also speculates that the Berndt family's financial condition points to murder. The State is wrong and the argument is a slap in the face of all wage-earning Americans. Skip Berndt had just received a promotion with more pay (T.1116). His wife was employed

(T.1116). His financial affairs were good enough to get a loan to pay for his used car. He had had five different loans with the same company in the five years preceding the fire, all with the same credit life insurance (T.695-697). Community Credit believed Skip Berndt was financially stable. There was no evidence the "bill collector" was hounding him. If economics is an issue, one would keep an income producing partner. If getting out of a marriage is an issue, Mr. & Mrs. Berndt would divorce each other, a process they both had used previously. Indeed, there was no motive proven but mere invitation to speculate.

That speculation is especially apparent when the State deals with the infidelity issues. The Court correctly found that those problems, if they were even serious to begin with, were resolved. The State says that the



evening of the fire, Skip took someone for a ride in his new used car and was alone with her. What sort of speculation does the State wish this Court to engage in? The State says a person with whom Brenda previously had an affair was drinking with the Berndts on the night of the fire. Even though they all testified everyone was having a good time and Skip didn't know of the affair until trial, what kind of speculation is the State suggesting? The State proved nothing but only attacked Mr. Berndt's character. The Court correctly rejected that line of reasoning.

Second, no one, including trained police officers, smelled any gasoline on Skip Berndt or his clothing (T.123,162,163,251,267,775). His clothing was not confiscated (T.347). Petitioner states that all of the fire experts testified that it is common not

to smell gasoline at the scene of the fire or on a person or a person's clothing. That is not the evidence. Although many experts testified that it is not uncommon not to smell the gas used to start a fire, they did not testify that if a person spilled some in spreading the gasoline, that it would not be smelled. Indeed, Mr. Davis' and Mr. Gallien's uncontradicted testimony was that gasoline vapors would be attracted to the groin and armpit areas of someone spreading five gallons. If the State's experts are correct, the gasoline vapors would instantaneously ignite throughout the house accounting for no smell. However, Skip Berndt would have also ignited had he set the fire because he would have been covered by vapors. The only individual who came close to testifying as the State suggests said he didn't smell gasoline after starting some

practice fires. However, we don't know how much he used; we don't know if anyone hugged him immediately afterward and therefore if that person smelled the gasoline; we don't know if he rode in a closed car with a police officer for over 20 minutes; we don't know if he went to a hospital a few hours later; and we don't know if he spread the gasoline while intoxicated after having been awake for nearly twenty-four hours. More importantly, however, the gasoline used in the practice fires was an oil-gasoline mixture -- decreasing the odor and explosiveness of the gasoline (T.164). What is true is that the firemen testified that they were taught to scream gasoline if they ever smelled any while fighting the fire (T.162). Indeed, the defense conducted an experiment on a piece of flooring tile similar to, but not taken from, Skip's home. Experiments



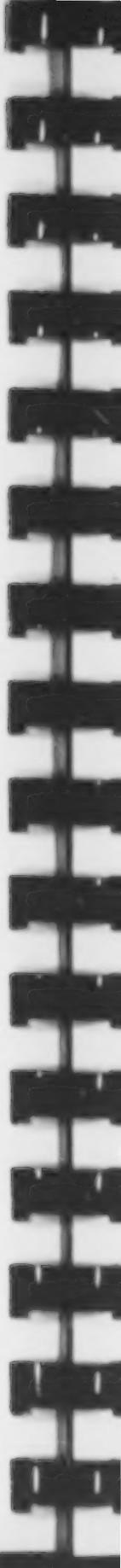
were run on Exhibit M, including the burning of gasoline on it. At trial, an investigator and former Minneapolis police officer, testified he could still smell gasoline on the exhibit (T.1287).

The State failed to prove that Skip got any gasoline anywhere. No siphoning equipment or container was found. Skip Berndt's car was searched. The police found nothing in it from an arson standpoint (T.973). The State suggests that 5 gallons of gasoline is a small quantity. The State is wrong. Was the five gallons carried in small containers of one gallon? If so, the process of spreading the gasoline would take an incredible amount of time. First, one gallon would have to be siphoned; then transported to the house; then spread throughout the house. That process would need to be repeated five times with only two results. One, the chances of any of



the occupants smelling the gasoline and leaving is greatly enhanced. Two, the gasoline would vaporize a long period of time and blow up the townhouse complex. The State criticizes this Court's statement that the caretaker was not missing any gasoline. The Court's conclusion was correct. The caretaker said the help used the gasoline (which was a gasoline-oil mixture) and the cans did not appear to be tampered with (T.917-919), and they were where they belonged (T.917-919).

The State says an explosion was heard by people one block away. However, the Sebraskis testified that it was like a firecracker on the Fourth of July. They also testified, they heard squealing tires after the pop (T.323). There was no evidence introduced that it was an explosion or that it came from Skip Berndt's home. The neighbors of Berndt



heard nothing. This includes Eddie Pickett, who said he was a light sleeper and heard Skip close his car door at a time consistent with Skip's arrival home from the night of socializing (1:00 a.m., T.204). He also testified Skip had nothing in his hands and had shoes on (T.205). The State's reference to State v. Daniels, a fire with mineral spirits and not gasoline, is totally irrelevant and the decision speaks for itself (See III, infra).

Third, the State says Skip could not have gotten out of the house. However, the State neglected the testimony of its own witness, Charlie Catron. Mr. Catron concluded that Skip and he came out of their homes at the same time (T.255). The State now tries to discredit this testimony. However, Charlie Catron did go back into Skip's home almost immediately (T. 257). He went over part

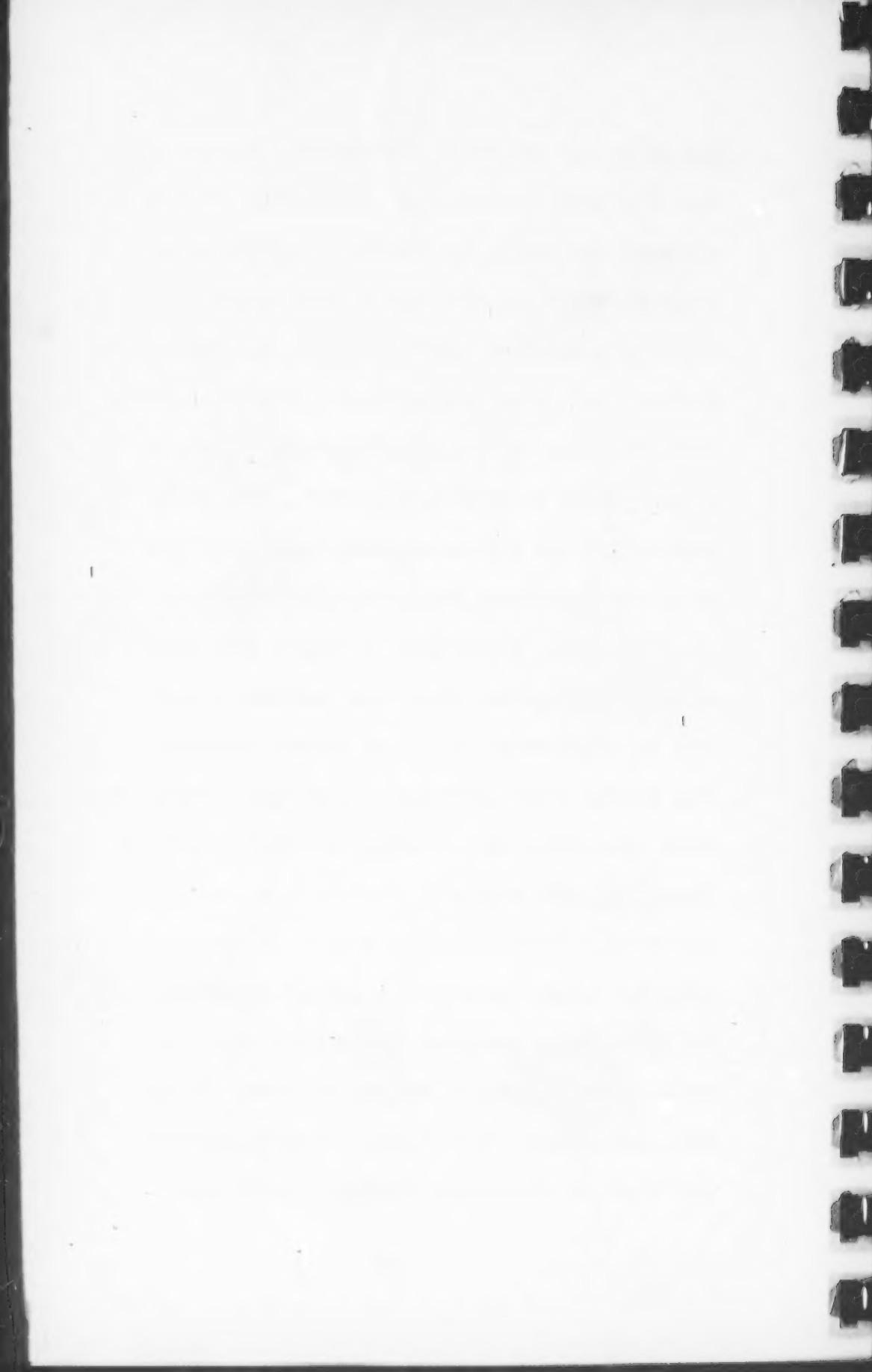


of the same area Skip said he went over, an area the State said contained gasoline (T.257-259), and therefore impossible to navigate. Mr. Catron did not experience severe injury (T.258). As a matter of fact, Mr. Catron got into the house as far as the metal strip separating the carpeted area from the linoleum area and to the feet of Brenda (T.258-259). If the State was correct, Charlie Catron could not have gotten into the house because he would first have had to go through burning gasoline vapors. As the experiments showed, linoleum tile burned with gasoline retains its high heat; Charlie Catron would not have been able to get in. If the State's theory was right, Charlie Catron would have perished in the fire or been severely disfigured. He wasn't. He experienced some singeing (consistent with Skip's injuries) and only "burned" himself when he touched a

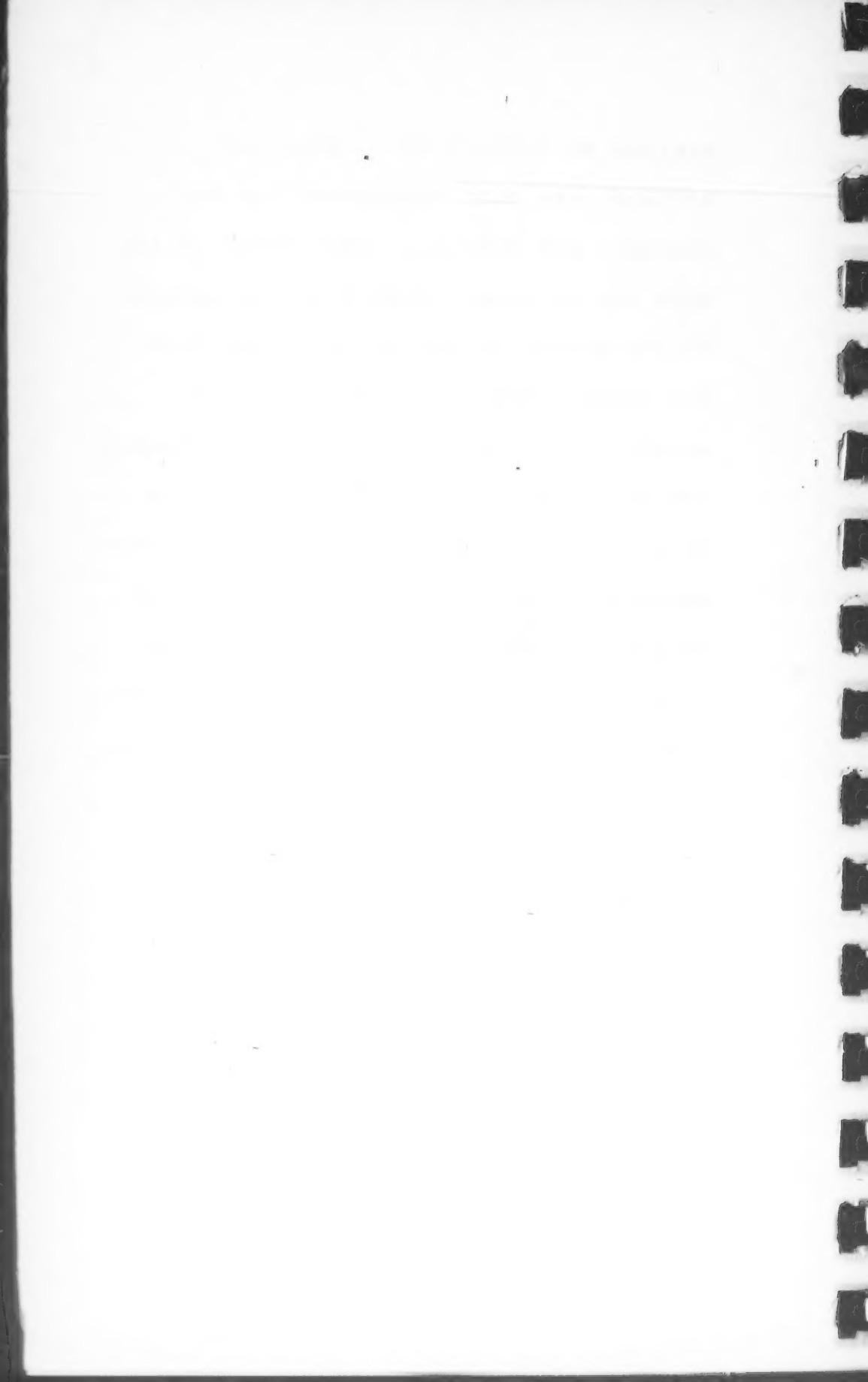


metal strip (T.260). Contrary to the State's theory, he saw no flames in the kitchen or entry as he went in (T.269-270). Clearly, the State was wrong. Even though Skip didn't prove he saw a doctor, he didn't need to. The State has this burden, not the defendant. In any event, Skip's mother, sister, and Skip testified to the condition and terrible pain of his feet (T.1144,1238,1253).

Fourth, the State alleges the Court erred in holding that the upstairs was not on fire when Officer Adams arrived. The State then contends that the issue of when the fire department arrived must be found in the State's favor, i.e. early arrival. However, the State is wrong. Officer Adams says he arrived at 2:48. He also kept calling the dispatcher to tell them it was a serioius fire (T.62). Officer Debra Christman, also a police officer of Brooklyn Center, said she



arrived at 2:55 (T.80). When she arrived, the fire department was not present, and only the lower level of the home was on fire. Within thirty seconds to one minute of her arrival, she said the second floor ignited (T.82). A neighbor, however, said Officer Christman was the first police officer to arrive (T.184). Also, a fireman present at the scene and fighting the fire said it had an average amount of smoke and did not have rapid acceleration (T.159-160). He also said that gas can be smelled at the scene (T.162). He also testified that the idea that gasoline had been used to set the fire never entered his mind even though he was a fireman for 16 years (T.163). A neighbor, who specifically disputed the arrival time of the fire department stated that the fire appeared controlled when it was fought with the pumper truck (T.229,231,283-284).



However, when that ran out of water and the hoses had to be connected to the hydrants, the house reignited and the fire was much worse (T.284).

Fifth, contrary to the State's theory and assertion in its petition, the carbon monoxide levels of Brenda and the boys are inconsistent with a gasoline fire. The State's theory was that five gallons of gasoline was spread throughout the home --either quickly and carelessly or slowly and carefully. All who testified agreed gasoline starts to vaporize immediately upon being spread. All also agreed that lighting the fire would instantaneously ignite or explode all of the vapors throughout the home, wherever the vapors were. The State theorized that gasoline and vapors were present in the boys' bedrooms. However, if that were the case, the vapors in the rooms would have immediately ignited.



The boys would have breathed super-heated air and died. They would not have had a lethal level (more than 40%) of carbon monoxide in their systems (T.882).

Rick's level of carbon monoxide was 75%, Corey's was 72%, and Mike's was 90% (T.882). Consequently, gasoline vapors could not have been present. Brenda's death was also inconsistent with the State's speculative theory of knocking her out, pouring gas on her and lighting the fire. Had that happened, she would have virtually no carbon monoxide because the gasoline vapors would have ignited, she would have breathed and seared her lungs with no absorption of carbon monoxide. However, Brenda had 25% carbon monoxide; close to a fatal amount and indicative of breathing smoke.

The State's case was grounded on speculation and character assassination. The Court correctly rejected it. The



State invites this Court to engage in further speculation. That invitation should be rejected.



III.

THE PETITION FOR REHEARING
SHOULD BE DENIED BECAUSE SKIP
BERNDT IS INNOCENT AND THE
PETITION INCLUDES MATERIAL
BEYOND THE RECORD ON APPEAL.

Approximately 40% of the material presented by the State in support of its Petition for Rehearing, exclusive of photocopied cases, is information outside the trial record. One can only assume that this was done in an attempt to bring improper influence and pressure on this Court to agree with the State. These tactics should not be tolerated. (Note: the Mr. Knutson contained in the improperly appended transcript is not the Mr. Knutson who represents Skip Berndt.)

The only proper information before an appellate court is matters admitted in the trial court. This Court has so ruled:



It is elementary that the supreme court is vested only with appellate jurisdiction Appeals, therefore, must be decided solely upon the evidence actually presented to the trial court and shown by the record on appeal Affidavits, filed or obtained after the trial obviously could not have been presented to the trial court and are entitled to no place in the appellate record and briefs. Clearly, they may not be considered as part of the evidence by a court of review.

Holtberg v. Bommersbach, 235 Minn. 553, 51 N.W.2d 586 (1952). Because the improper material is so intricately intertwined with the petition as a whole, counsel requests the entire petition be denied as the only effective method of excision.

However, the State did file material outside the appellate record. Counsel could disregard the material and thereby give it greater credibility. Or counsel could respond and be accused of "protesting too much." Recognizing the



inherent evils in such a decision, counsel for Skip Berndt will respond to the improper allegations.

Skip Berndt is innocent and the State did not prove he wasn't. This Court was correct in that assessment. The State has now included a series of affidavits which are false in their implications. The State has alleged that Skip Berndt has confessed to the crimes. That is not true (See Appendix 1-3). But because the State has taken this case out of the courtroom and into the media, counsel for Skip Berndt cannot idly sit back and fail to respond.

What would the State do if Malveaux testified for a criminal defendant? The State would point out to the jury that he has been convicted of aggravated robbery with a gun on January 12, 1977, theft and attempted escape on February 29, 1980, escape on November 14, 1980, theft from



person on January 12, 1983, two counts of robbery on March 18, 1983, and the crime of escape on April 3, 1986. All of these are felonies (See Appendix 4-9).

If Malveaux testified for a criminal defendant and he and the defense attorney said no promises were made for the testimony, the State would then show that Malveaux was promised a transfer to Lino Lakes (a minimum security institution) from Stillwater (a maximum security institution) in exchange for the testimony. The State would then show that Malveaux escaped from Lino Lakes in 1985. The following is the MCIU CASE COVER SHEET regarding that incident:

The defendant was in lawful custody of the Minnesota Department of Corrections at the correctional facility at Lino Lakes. At 7:45 p.m. September 21, 1985, the defendant had a visitor and as the visitor was leaving, he asked to take a laundry basket



out to the visitor's car. The defendant then left the institution grounds and did not return . . . he was located in Texas and returned to the State of Minnesota

How would the State treat Malveaux if he testified for a criminal defendant and used those statements to implicate a third party? The State would point out that the statement was never a "confession" and that the words were ambiguous because Malveaux told the police, "And what I got from what he said, that he set the fire himself." The State would then point out to the jury that Malveaux never reported this "conversation" to anyone at the time it was made and came forward only when he was in a position to get something. The State would then put Malveaux's affidavit next to the Parks' affidavit and show how the ambiguous statement grew and changed into something entirely different as



payment time neared for the services rendered. The State would also call Mr. Frank Benjamin. Mr. Benjamin would testify that Malveaux offered to lie for Benjamin in court to get Benjamin out of a potential criminal charge. (See Appendix 21). In its final impeachment of Malveaux, the State would quote the following from the January, 1983, nonconfidential portion of his presentence investigation:

He stated he gets into trouble when he has nothing to do but also stated he likes the excitement of crime and said there is a certain thrill in getting away with something and talking about it to others. (See Appendix 10-12).

Skip Berndt has steadfastly denied committing a crime. There is no evidence to the contrary. The State waited one year to charge him in an attempt to get such evidence. Now an individual who has much to gain tells a story of something



that he says happened more than one year ago. The State wouldn't believe him if he testified for a defendant or if his evidence was the basis for a new trial by a defendant. There is no reason to accord him more dignity just because the State is in a position to purchase his story. Purchased testimony is like purchased love: you get what the seller thinks you want (See Appendix 13,14).

The State has included a complaint by the Roseville Fire Marshall against Professor Shelby Gallien. The State's immaterial and irrelevant documents seek to show that Professor Gallien is a fake and a charlatan. Also, the State seeks to show, by a letter from Massachusetts dated two days before it was printed, bound, and filed with this Court, that Professor Gallien has avoided a response on the complaint. The complainant was retained by the State to assist in



preparation of its case and sat next to the prosecutor throughout the entire trial.

The attached affidavit shows that these allegations are false (See Appendix 15,16). The President of the National Association of Fire Investigators received a letter from the fire marshall castigating the National Association of Fire Investigators for honoring Professor Shelby Gallien as their Man of the Year in August, 1985. The President said the complaint was without merit and was dismissed. The President also concluded that the fire marshall lacked even an elementary understanding of the field of fire and arson investigation. The President suggested that if the fire marshall wished to pursue the matter, he should contact the International Association of Fire Investigators (See Appendix 17-20). The President then



stated Professor Gallien has suffered a series of debilitating strokes which have left him bedridden, blind, and without mental faculties. He lives in a nursing home in his hometown.

The State has included transcripts and the opinion from State v. Daniels, 380 N.W.2d 777 (Minn. 1986). Because these materials were not presented to the trial court and are not part of the record, they are improperly before this Court. However, as the Daniels' decision points out, there is no relevance to Skip Berndt's case. First, witnesses virtually saw Daniels ignite the apartment. Second, Daniels didn't dispute any of the expert testimony. Third, Daniels virtually confessed before, during, and after the fire. Fourth, the witnesses testified to fights between Daniels and the mother of the decedent three days before the fire and



the day of the fire. Fifth, the State proved Daniels hated the decedent.

Finally, the fire was not started with gasoline. Obviously, the two cases are unrelated. Each rose and fell on the state of its own record.



IV.

THE PETITION FOR REHEARING AND
MOTION FOR ORDER DELIVERING
EXHIBITS SHOULD BE DENIED
BECAUSE THE RESPONSIBILITY FOR
ENSURING DELIVERY OF THE TRIAL
RECORD IS WITH COUNSEL.

The State alleges that a portion of the trial court exhibits was not forwarded to the Supreme Court. Assuming arguendo that this occurred and also assuming that the Court did not refer to the exhibits, it is clear the Court did not need to view the exhibits because the testimony was clear. The two exhibits the State contends were most important -- those showing the floor plan of the ground floor and second floor of the townhouse -- were included in the Appendix to Appellant's Brief. Although those diagrams did not include the red lines or body positions, they did include the five areas of the alleged



chromatographically shown gasoline. Consequently, no prejudice was suffered by the State. These issues were extensively briefed and argued by counsel. Counsel could have included copies in its appendix if counsel felt the exhibits significant to the argument.

The responsibility of ensuring delivery of the record is on the party wishing to rely on it. This Court has held that the litigant who wishes to utilize the record " . . . bears the burden of taking the necessary steps to have the clerk of the trial court forward the original file to the Supreme Court." Holtberg v. Bommersbach, 235 Minn. 553 (1952). Counsel referred to the testimony explaining the exhibits, fully briefed, and argued the issues. Because counsel did not take the necessary steps of ensuring delivery, counsel cannot

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complain after the Court has rendered its decision.



CONCLUSION

In conclusion, the Petition for Rehearing should be denied. The double jeopardy protection attached on the rendering of this Court's decision. The mere filing of a document by the State, regardless of its title, cannot alter that fact. Because a reversal of a conviction for insufficient evidence has the same effect as an acquittal, appellate review is not proper. This Court's decision was correct from both a factual and a legal position. The State is merely restating arguments advanced in its appellate brief and at oral argument. The information outside the record which has been used by the State is false and purposely



misleading. The petition should be denied.

Respectfully submitted,

WILLIAM R. KENNEDY
Hennepin County Public Defender

By _____

DAVID KNUTSON
(Atty. Lic. No. 57058)
Assistant Public Defender
Attorney for Respondent
C-2300 Government Center
Minneapolis, MN 55487
(612) 348-7530

DATED: this 10th day of June, 1986.



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STATE OF MINNESOTA

SS: AFFIDAVIT

COUNTY OF WASHINGTON

XX

I Robert D. Mitchell, being first duly sworn under oath,
deposes and says:

I met SKIP BERNDT soon after he got out of R & O and came to work
in OMR print shop here at Stillwater prison.

He was a self-starter and learned quickly so I made it a point
to get to know him and teach him as much about printing as I was
able. And in the process we got fairly close on and off the job.
Also despite being a confirmed cynic and pessimist, I realized he
did not belong in prison....I should know...I've spent more than
thirty years in and out of federal and state prisons. For these
reasons I also gave him advice on doing time. To choose his friends
carefully, the type of people to avoid, not to just associate with
anyone because they were friendly. He was a man out of place and
knew it. Because of it, he hung mostly with guys from work for a
long time.

During the time in question, (last April) he was very busy with
his appeal and if I remember right calling and writing his attorney
regularly. We had just moved back to B-east in March and he was
borrowing my law books and case law constantly. I also read his
transcripts and briefs and gave him advice on shepardizing etc.
All during that period he wasn't to my knowledge sharing pot or
confidences with strangers as the state claims in the newspapers.

Page / of Appendix



In prison we are plagued by opportunists who when in trouble will take advantage of others due to jealousy or hopes that it will help them with the authorities. Jails do not teach a serious regard for the truth. Not when it is to avoid punishment upon ones self.

The system takes advantage of this. And certain individuals play on it, in these places.

I still feel that Skip is innocent of the crime charged and that an investigation of the so called witness be made with an open mind.

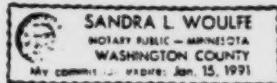


ROBERT D. MITCHELL #120312

SIGNED AND SWORN TO BEFORE ME

14th DAY OF April, 1986
Sandra L. Woulfe

Notary Public or other person authorized to administer oath.



Page 2 of Appendix



STATE OF MINNESOTA

SS:

AFFIDAVIT

COUNTY OF WASHINGTON

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

I Dean Danielski, being first duly sworn under oath, deposes and says: I met SKIP BENEDT during early February 1985; at which time i began work at the OMR print shop here in Stillwater prison.

Skip seemed like a very caring and compassionate individual, and we soon became very good friends,sharing not only work but also personal problems and each others company as well. We also shared each others cases and it became evident that from all the evidence(or lack of) that we also believed in each others innocence. Skip always maintained that he was innocent and still found it very hard to deal with the loss of his family. Skip always had a picture of his family hanging on his cell wall, something that a guilty person would not do. During the time in question, (April, 1985) Skip, Pat Patrick and myself spent alot of time together. We not only worked together but also shared each others problems and joys. Skip was not one to share confidences with strangers or smoke pot as has been claimed by the state in the newspapers.

I am proud to have Skip for a friend and firmly believe in his innocence and would strongly question the truthfullness and the motives of the so-called witness.

Dean A. Danielski

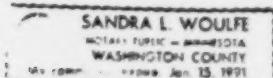
DEAN A. DANIELSKI

SIGNED AND SWORN BEFORE ME THIS

14th DAY OF April, 1986

Sandra L. Woulfe

Notary Public or other person authorized
to administer oath.



Page 3 of APPENDIX



DATE: April 16, 1986
TO: David Knutson
FROM: Russ Krueger
SUBJECT: State versus Orville Berndt

On this date, I along with Robert Bickford of this office went to the Minnesota Corrections Facility in Stillwater, Minnesota. There talked to Gayle Rachey, DOB 3/14/50, who at the end of the month will be moving to Duluth at 519 North 22nd Avenue West, 55806, (218) 722-8151. He stated that he was a friend of Orville Berndt's and also of Frank Benjamin's.

He stated that Frank Benjamin had been up to Anoka County on an escape charge and was accompanied by Tony Melvow. He said there were two females also going to Anoka Jail, and while they were either walking to or in the elevator Frank Benjamin grabbed one of the female inmates by the posterior or as Gayle Rachey said, "he grabbed her by the ass." Frank Benjamin told Gayle Rachey that the girl complained to the Sheriff and that they were going to bring him up on charges on Criminal Sexual Conduct. When they were discussing it in the cell Tony Melvow told Frank Benjamin, he said, "I will lie for you in court, tell me what you want me to say; to hell with them broads I'll lie for you." He said he thought nothing of it, but when he came back the more he thought of it he thought it was kind of funny, but he was worried about being charged in Anoka County and told Gayle Rachey what had happened, and Rachey stated, "just make sure that he'll still be around to testify for you if he's needed."

Rachey stated that Melvow was on a highrisk back in 1980 because he did escape, then he had the two escapes from Lino Lakes. He said while he was in the same cell block area with him, just before he left for Lino Lakes about March 19th of this year, that Melvow got a letter from the State of Texas. It was in regards to him having a gun in possession when he was arrested for fleeing a police officer while he was on escape from Lino Lakes. Melvow wanted to know if Rachey could help him in case he needed to get some kind of quick advise so he wouldn't have to go back to Texas. Rachey said that Melvow never showed him the letter, but had told him on previous occasions what had happened in Texas, that they had a highspeed chase and when they arrested him he had a gun in possession, and they were going to charge him down in Texas with felon with a pistol and also with fleeing a police officer, felony fugative.

He stated that as long as he knew Skip Berndt in jail, Skip never used any drugs. He then told us to talk to Reed Doc Holiday, another inmate in the institution. Reed Holiday was brought in and he stated that he, himself, has smoked a lot of marijuana but on several occasions asked Berndt if he wanted to use some, and Berndt kept on turning him down. Reed suggested that we talk to Floyd Patrick who was the best friend of Berndt's while he was in jail. He said that Melvow was known as a story teller, that he would match any story that anyone else had to say, and really doubted that Melvow got next to Berndt because Berndt wasn't that type, because to put it quite bluntly, he said, "Berndt did not like blacks." He said Melvow is black black,

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and referred to Melvow on a couple of occasions that he didn't trust the "little nigger." Then Rachey and Holiday stated that nobody trusted him and nobody had nothing to do with him. He said he had very few friends and even the rest of the blacks in the cell block area had nothing to do with Melvow. He was known as a snitch for the screws and nobody went near him. We will attempt to talk to Floyd Patrick tomorrow and also we are going to get transcripts from the court sentencing in Anoka by Judge Phyllis Jones. This date, Robert Bickford went to that area to contact the Judge's court reporter and the clerk of court.

/s/Mr. Russell Krueger
Investigator

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AFFIDAVIT

State of Minnesota }
County of Hennepin } ss.

CRAIG CASCARANO, being first duly sworn and deposed, says that:

- 1) He is the attorney who represented Orville Berndt, Jr. at trial;
- 2) On April 12, 1986, Affiant spoke to John Kennedy, President of the National Association of Fire Investigators;
- 3) Mr. Kennedy told Affiant that in August, 1985, the National Association of Fire Investigators were honoring Mr. Shelby Gallien as Man of the Year;
- 4) The honor was based upon outstanding achievements and contributions to the field of arson and fire investigation;
- 5) Just prior to the national convention, as president of the National Association, Mr. Kennedy received a letter from Mr. Bruce Ryden, Fire Marshal of Roseville, Minnesota, complaining that Mr. Gallien was not worthy of the honor about to be bestowed upon him by the National Association;
- 6) Mr. Kennedy told Affiant that upon reading Mr. Ryden's letter, it became apparent that Mr. Ryden lacked even an elementary understanding of the field of fire and arson investigation, as well as the sciences of physics and chemistry that are an integral part of arson investigation;
- 7) Mr. Kennedy told Affiant that Mr. Ryden's complaint was totally without merit and was dismissed by the National Association as frivolous;
- 8) Mr. Kennedy sent Mr. Ryden a letter firmly rebuking him for an unwarranted and unfounded attack upon Mr. Gallien;
- 9) Mr. Kennedy further advised Mr. Ryden that if he wished to pursue his complaint, he should contact the International Association of Fire Investigators;
- 10) Mr. Kennedy has learned that Mr. Ryden contacted the International Association, but the complaint has not been investigated because they were not able to locate Mr. Gallien;

Larry C. Cascarano
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- 11) Affiant has learned that Mr. Gallien suffered a series of debilitating strokes, leaving him bedridden, unable to see, and virtually with no mental faculties;
- 12) Mr. Gallien is confined in a nursing home in his hometown.

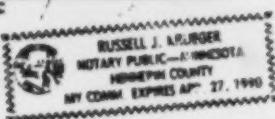
FURTHER, AFFFIANT SAYETH NOT.

Craig Cascarano
CRAIG CASCARANO

Subscribed and Sworn To this

17th day of April, 1986.

Russell J. Kuebler
Notary Public



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NATIONAL ASSOCIATION OF FIRE INVESTIGATORS

A Non Profit Association

53 WEST JACKSON BOULEVARD • CHICAGO, ILLINOIS 60604 • PHONE (312) 939-6050

First Vice President
SHELBY GALLIEN
Professor
Director of Public Safety Institute
West Lafayette, Indiana

President:
JOHN KENNEDY
Fire Investigator
John A. Kennedy & Associates, Inc.

Treasurer:
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September 6, 1985

Board of Directors:

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Fire & Explosion Expert
Chicago, Illinois

Mr. Bruce E. Ryden, Fire Marshal
Bureau of Fire Prevention & Investigation
Roseville Fire Department
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Roseville, Minnesota 55113

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WILLIAM R. PECK
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Southwestern Ass. Company
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RUPERTO CLEGHORN
Corpo De Bombeiros Da Pernambuco
Pernambuco City, Pernambuco

SGT. P. GENE DECK
Armenian Heights Police Department
Armenian Heights, Illinois

JOHN WALTZ
Fire Investigator
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ROONEY A. BELL
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GEORGE WILLIAMS
Wisconsin Farmers Mutual Ins. Co.
Janesville, Wisconsin

Captain **WILLIAM R. SHORTWAY**
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DOUG RIDER

Fire Investigator
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ROBERT J. FREUND
Electrical Engineer
Des Plaines, Illinois

DR. ROLFE E. SCOFIELD
Cape Cod Community College
Yarmouth Port, Mass.

PAUL MITTELSTEADT
Wisconsin Farmers Mutual Ins. Co.
Janesville, Wisconsin

JOHN L. ODOM
Fire Investigator
Chattanooga, Tennessee

Dear Mr. Ryden:

I thank you for your letter of August 29, 1985
regarding Professor Shelby Gallien.

I can see from the comprehensive and thorough
nature of your letter that you have given this
subject a great deal of thought.

I will attempt to answer your letter to the best
of my ability. I hope you will accept this in the
same kindly, friendly, and informative way in
which it is intended.

In the last paragraph of your letter you state:

"I would ask that you respond to this letter
but realize that no response will probably
ever be forthcoming as there can be little or
no defense for the action of Mr. Gallien".

I do not know why you would believe that I would
not respond to your letter. I answer all of my
telephone calls and each piece of mail that is
addressed to me.

BRUCE HULME
Fire Investigator
New York, New York

MICHAEL C. DAVIDSON
Fire Investigator
Wheat Ridge, Colorado

BOB DOYLE
Fire Investigator
Greencastle, Indiana

Captain **GEORGE PACKISH**
Portsmouth, Mass. Fire Dept.

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I was surprised by your letter. I did not know that Mr. Gallien testified in that fire case you mentioned.

I have always thought of and respected Shelby Gallien as a teacher and professor who initiated much of the training that is now being done in the fire field.

Shelby Gallien is being honored as NAFI "Man of the Year" in 1985 for his efforts in establishing the original Purdue Arson Seminar in 1943 when he was a Professor at Purdue University and headed up the Public Safety Institute at that University.

From that first Seminar in 1943 where less than 20 persons attended, that annual event grew until it later attracted as many as 400 fire investigators from all over the world. The Purdue Arson Seminar was the first school to teach any type or kind of fire investigation. It has since been emulated by many schools, seminars, and training programs throughout the country.

It was at this Purdue Arson School that the International Association of Arson Investigators was planned, formulated, and given birth. Shelby Gallien was instrumental in the formation of that fine organization. If it were not for Shelby Gallien and some of the other pioneers in that field, that Association would not exist.

Shelby Gallien was honored by the LAAI on numerous occasions when they held their annual meetings at Purdue. I hope your opinion of Shelby Gallien based on his courtroom testimony does not also cause you to question the credibility of the International Association of Arson Investigators, or the reliability of the information being provided by them to inexperienced investigators.

I know of no Association such as LAAI or NAFI which would take responsibility for an individual member's opinion as expressed in courtroom testimony. In almost every fire case which is tried there are qualified and credible fire experts testifying on behalf of both the plaintiff and defendant in both civil and criminal cases. This certainly does not mean that the experts on one side would deride the opposing experts because they differ with their opinions.



I am extremely sorry that in the first paragraph of your letter you state that you cannot attend our 23rd Seminar to be held the week of September 18, 19, and 20, 1985 at the Bismarck Hotel in Chicago. I believe that free expression should be given to all persons who objectively consider facts such as you have listed in your letter. It would be my intention to give you some podium time to discuss the facts contained in your letter with those persons in attendance.

I think that differences of opinion should be expressed when they are honest, constructive, and meant for educational purposes.

At any rate Mr. Ryden, I want you to know that the National Association of Fire Investigators is honoring Shelby Gallien for his over 50 years in the fire field. They are honoring him for his being a pioneer in setting up fire schools and seminars as well as for his assistance in formulating and helping with the creation and continuation of both the International Association of Arson Investigators as well as the National Association of Fire Investigators.

In paragraph two of your letter you state "Surely there must be some member of your Association who is more qualified to receive this award than Shelby Gallien". We know of no person in the entire Association or in any other fire Association that has done as much for the fire field as Shelby Gallien has done in initiating and perpetuating training programs that started with Purdue University and with Shelby Gallien. If you know of any other persons in the fire field who you would like to nominate, we would appreciate your input and would seriously consider it.

Incidentally, Mr. Gallien was the victim of a life threatening stroke about a year ago. He has been confined to a hospital for the last 6 months. We are hoping that his family will be able to have him present at the seminar to receive his award in person, and to hear from his many friends who wish to acknowledge his contribution to the fire field which covers almost 50 years.

Many of the present fire investigators were not even born when Shelby Gallien encouraged the university to initiate the first fire program ever established at any location anywhere.



At any rate, we at the National Association of Fire Investigators thank you for your letter. We acknowledge that each person is entitled to his own opinion, and as I said previously we encourage diversity of viewpoints when given and held honestly in an objective fashion.

We believe your comments were meant in that way, and we accept them as such.

We would like to hear from you further. Perhaps you can suggest a candidate for the 1986 award.

Sincerely,

THE NATIONAL ASSOCIATION
OF FIRE INVESTIGATORS


John Kennedy
President

JK/cs

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DATE: April 30, 1986
TO: David Knutson
FROM: Russ Krueger
SUBJECT: Orville Berndt

On this date, I went to Hennepin County Jail to talk to Franklin Benjamin, who is held for Probable Cause Burglary. I talked to Franklin Benjamin about Antione Melvow. Franklin Benjamin stated that he knew Melvow real well; described him as a male whore that he knew in Stillwater. He said that he knew Bert a little bit but not alot, but knew Melvow better. Franklin Benjamin stated that they were on their way up to Anoka County to face an escape charge, and that Melvow was also on his way there to face an escape charge. While they were in the elevator or small room, he can't remember which, he was in the back corner facing the door and there were two females ahead of him. He said Melvow was up near the front of the building facing the same direction he was, and was the first one out of the door. He stated while they were in the room the girls accused him, Franklin Benjamin, of grabbing them by the ass; he denied it. The jailors talked to Franklin Benjamin about it, and he denied, and Antione Melvow told Franklin Benjamin at that time, "don't worry about it, I'll lie for you when we get to court." Franklin Benjamin stated that Melvow had no way to see the incident, if it did happen he said, but he was compromising himself and told Benjamin that he would lie for him in court.

Franklin Benjamin stated that Melvow would do anything for favors; he used to trade his body for sexual favors so he could get dope, cigarettes, candy, etc. from the other prisoners. He said he is a liar and an exaggerator. He would so testify in the court of law.

No promises or threats were made to Franklin Benjamin, all he asked for was help on his case, to have somebody represent him, and if it's possible to help his tow friends that were with him that were picked up on a similiar charge. One being Robert Grayowl, and the other one Ambros Keybolt.

/s/Mr. Russell Krueger
Investigator

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MOTION FILED
NOV 26 1986

No. 86-704

IN THE
Supreme Court of the United States

October Term, 1986

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA

**MOTION FOR LEAVE TO FILE BRIEF
AND
BRIEF OF AMICI CURIAE,
MINNESOTA COUNTY ATTORNEYS
ASSOCIATION,**

Joined By

NATIONAL DISTRICT ATTORNEYS ASSOCIATION,
THE STATE OF FLORIDA, THE STATE OF ILLINOIS,
THE STATE OF INDIANA, THE COMMONWEALTH OF
KENTUCKY, THE STATE OF LOUISIANA, THE STATE
OF MISSOURI, AND THE STATE OF WYOMING,*
IN SUPPORT OF PETITIONER STATE OF MINNESOTA

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* Each sponsored according to Rule 36.4 by its attorney general pursuant to list of counsel contained inside front cover.

List of Counsel continued:

The State of Florida, by and through Attorney General Jim Smith and Assistant Attorney General George Georgieff;

The State of Illinois, by and through Attorney General Neil F. Hartigan;

The State of Indiana, by and through Attorney General Linley E. Pearson;

The Commonwealth of Kentucky, by and through Attorney General David L. Armstrong;

The State of Louisiana, by and through Attorney General William J. Guste, Jr.;

The State of Missouri, by and through Attorney General William L. Webster;

The State of Wyoming, by and through Attorney General A.G. McClintock and Assistant Attorney General Allen C. Johnson.

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IN THE
Supreme Court of the United States
October Term, 1986

No. 86-704

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

**MOTION FOR LEAVE TO
FILE BRIEF OF AMICI CURIAE**

The Minnesota County Attorneys Association ("MCAA") and the National District Attorneys Association, Inc. ("NDAA") respectfully move for leave to file the attached brief as amici curiae. States sponsored by their attorney general according to Rule 36.4 have joined in this brief. In support of this Motion, MCAA and NDAA would show the Court as follows:

1. *Interest of Amici Curiae.* MCAA represents all the county attorneys in the State of Minnesota. By law, county attorneys have the responsibility of prosecuting all those accused of committing serious criminal offenses in their jurisdiction. MCAA has submitted numerous *amicus curiae* briefs to the Minnesota Supreme Court and has joined in *amici* briefs before this Court.

NDAA is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

2. *Specific Interest in the Case at Bar.* MCAA's and NDAA's members are continuously engaged in the prosecution of criminal cases, including many cases presenting issues related to those in the case at bar. Their statutory obligations are directly affected by the standard of review applied to determine evidentiary sufficiency. Since MCAA's and NDAA's members appear in trial courts to represent the states in these cases, they may be able to assist the Court in developing the issues fully.

3. *Purpose of Amicus Curiae Brief.* MCAA's and NDAA's purpose, in this brief, is to analyze the case authority in ways that are not present in other briefs. Amici curiae has communicated with counsel for Petitioner in an effort to avoid undue duplication. It is believed that this brief argues the issues in a manner that was not done in Petitioner's Petition for Writ of Certiorari.

4. *Public Importance of the Issues Addressed Here.* Since this Court's decisions in *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978), a state court's unreversed ruling of evidentiary insufficiency bars retrial under the fifth amendment's double jeopardy clause. It has been unclear whether state courts may attach the label of insufficiency to cases where the evidence satisfies the federal standard of evidentiary review. Standards of review employed by state courts have been anomalous. The decision of the Minnesota Supreme Court is an example. There is a great

need for clarification as to what standard of review must be employed to determine evidentiary insufficiency to avoid anomalous application of the double jeopardy clause.

5. *Requests for Consent.* The consent of the Petitioner to the filing of this brief has been requested and granted. The consent of Respondent has been requested and refused. This Motion is therefore filed in accordance with the Rules of this Court.

FOR THESE REASONS, MCAA and NDAA prays that it be granted leave to file the attached brief as amici curiae.

Respectfully submitted,

STEVEN C. DeCOSTER
Counsel of Record
c/o Ramsey County Attorney's
Office
Suite 400, 350 St. Peter Street
St. Paul, MN 55102
Phone (612) 298-5464
Attorney for Amici Curiae



IN THE
Supreme Court of the United States

October Term, 1986

No. 86-704

STATE OF MINNESOTA,

Petitioner,

vs.

ORVILLE BERNDT, JR.,

Respondent.

—
BRIEF OF AMICI CURIAE
—

INTEREST OF AMICI

Amici are prosecutor associations and states that support the Petitioner's position and urges this Court to grant a Writ of Certiorari. Amici interest in this case concerns the effect the double jeopardy clause of the fifth amendment to the United States Constitution will have upon the equitable administration of justice nationwide and upon prosecutors' ability to enforce the law if its reach is extended to every ruling of evidentiary insufficiency regardless of the standard of review utilized to reach the ruling.

Federal courts may only rule that evidence is insufficient in a case if the evidence fails to satisfy the federal standard of evidentiary sufficiency. But, as the decision below demonstrates, state courts do not necessarily adhere to the federal standard when making insufficiency rulings. State prosecutors' efforts to bring criminals to justice will be unduly hindered by the fifth amendment's double jeopardy clause if state courts are permitted to attach the label of evidentiary

insufficiency to convictions where the evidence clearly satisfies the federal standard of evidentiary sufficiency. State criminal defendants should not be extended greater constitutional immunity from retrial under the fifth amendment than that given to federal criminal defendants. To avoid the unnecessary hampering of law enforcement and the inequitable application of the double jeopardy clause's bar against retrial, insufficiency rulings by state courts and federal courts should be based upon a uniform standard of evidentiary review.

SUMMARY OF ARGUMENT

The decision below holds that the evidence is insufficient to sustain the convictions. This ruling was not based upon the federal standard of evidentiary review but, unless there is clarification by this Court, retrial will be prohibited. Since the fifth amendment's double jeopardy clause bars retrial when there is an unreversed insufficiency ruling, state court insufficiency rulings should be based upon the federal standard of evidentiary review. Whether the double jeopardy clause permits government appeals of post verdict insufficiency rulings also requires clarification by this Court. Prior decisions by this Court indicate that such appeals are constitutionally permissible. A decision by this Court will eliminate ambiguity on this issue.

ARGUMENT AND AUTHORITIES

I. THERE IS A CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND THE DECISIONS OF FEDERAL COURTS AND OTHER STATE COURTS ON THE STANDARD UTILIZED TO DETERMINE IF EVIDENCE IN A CRIMINAL CASE IS INSUFFICIENT AS A MATTER OF LAW AND RESOLUTION OF THIS CONFLICT IS OF FEDERAL CONSTITUTIONAL IMPORTANCE.

Beyond the question of the miscarriage of justice in this case is the broader question of what standard of evidentiary sufficiency must be utilized to justify applying the fifth amendment's double jeopardy clause to post verdict insufficiency rulings. In justifying extension of the double jeopardy clause to appellate insufficiency rulings in *Burks v. United States*, 437 U.S. 1 (1978), this Court emphasized that federal courts may only reverse a conviction on insufficiency grounds if the evidence fails to satisfy the federal standard of evidentiary sufficiency. Under this standard a conviction must be sustained "if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's verdict." *Id.* at 17. That the *Burks* rule was intended to only apply to cases where the evidence fails to satisfy the federal standard of evidentiary review was demonstrated by this Court's decision in *Tibbs v. Florida*, 457 U.S. 31 (1982). This Court held in *Tibbs* that the *Burks* rule does not bar retrial when a state appellate court's evidentiary reversal is based upon the weight rather than the sufficiency of the evidence. See *id.* at 47. The decision in this case presents the situation where a state court reversed on the weight of the evidence and then labelled the grounds as evidentiary insufficiency even though

the evidence is sufficient under the federal standard of evidentiary review.

A detailed explanation as to how the evidence in this case satisfies the federal standard of review is set forth in the Petition for Writ of Certiorari submitted by Petitioner, the State of Minnesota, and will not be repeated here. But a reading of the decision below in the context of the record readily shows that despite the Minnesota Supreme Court's ruling of evidentiary insufficiency, its reversal was actually based upon its subjective reweighing of the evidence. The court's failure to adhere to the federal standard's requirement of viewing the evidence in the light most favorable to the prosecution is demonstrated in several ways.

First, although the Minnesota Supreme Court's traditional standard of evidentiary review contains a similar requirement that the evidence be viewed in the light most favorable to the prosecution,¹ the decision fails to mention this requirement. Second, the decision conspicuously and repeatedly fails to mention most of the physical evidence *and* the expert conclusions based upon this physical evidence. At no point does the decision mention that the fire scene contained over sixty feet of suspicious trailering patterns that could only have been caused by a flammable liquid (Pet. 6, Pet. App. J1-4, M5-6). Instead, the

¹ The Minnesota Supreme Court's traditional standard for reviewing evidentiary insufficiency claims is as follows:

In reviewing a claim of sufficiency of the evidence we must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude that the defendant was guilty of the offense charged The evidence must be viewed in the light most favorable to the prosecution and it is necessary to assume that the jury believed the state's witnesses and disbelieved any contrary evidence

State v. Ulvinen, 313 N.W.2d 425, 428 (Minn. 1981) (citations omitted).

decision creates the erroneous impression that the prosecution had no solid physical evidence and that its "entire case was bottomed on mere speculation or upon hypothesized 'facts.'"² *State v. Berndt*, 392 N.W.2d 876, 881 (Minn. 1986) (Pet. App. A12). Finally, the decision gives the misleading impression that certain evidence put forth by the defense constituted facts that were undisputed. The decision fails to note that the defense's theory of an accidental fire was contrary to the physical evidence and was ruled out as a possibility by the prosecution's arson experts (Pet. App. J1-4, K2-5, L4-5, L7-8, M4-5). More glaringly, the decision accepts the respondent's alleged story of escape without noting both that the physical evidence showed that the path of escape was covered with a flammable liquid making escape impossible (Pet. App. J1-4, K7, L3) and that the respondent dramatically changed his story six weeks after the fire (Pct. 8-9).³

² The Minnesota Supreme Court's dismissal of gas chromatograph test results and burn patterns as nonevidence is contrary to holdings by other American courts. Both federal and state courts routinely admit and rely upon such evidence to sustain criminal convictions. See e.g., *United States v. Metzger*, 778 F.2d 1195, 1203-04 (6th Cir. 1985), cert. denied, ____ U.S. ___, 106 S.Ct. 3279 (1986) (chromatograph test results); *United States v. Distler*, 671 F.2d 954, 959-962 (6th Cir.), cert. denied, 454 U.S. 827 (1981) (gas chromatograph test results); *Commonwealth v. Boden*, 399 Pa. 298, 306-08, 159 A.2d 894, 898-99, cert. denied, 364 U.S. 846 (1960) (suspicious burn patterns and expert testimony).

³ In relying upon the fact that no odor of gasoline was detected either at the fire scene or on the respondent, the decision fails to note that numerous fire experts testified that it is common *not* to detect the odor of gasoline either at the scene or on the arsonist once the fire is ignited (Pet. App. K5-6, K9-10, K10-11, L5, O1-4). The decision also omits any reference to the fact that the defense's arson expert conceded that smoke smells can mask gasoline odors (Pet. App. O5).

The evidence showing that this was an arson fire and that the defendant was the arsonist was extremely strong when viewed in the light most favorable to the prosecution. The only evidence that was not presented was an eyewitness who saw the defendant ignite the fire. But as the Pennsylvania Supreme Court once noted, “[f]ew criminals are caught ‘red-handed’ and if eyewitnesses of the crime were necessary few . . . arsonists . . . could ever be convicted.” *Commonwealth v. Boden*, 399 Pa. 298, 304, 159 A.2d 894, 898, cert. denied, 364 U.S. 846 (1960). Only by rejecting the prosecution’s arson evidence could any reviewing court conclude that the evidence did not support the verdicts. The decision demonstrates that without viewing either the witnesses or many essential evidentiary exhibits, the court “subjectively believe[d] that [the] defendant was innocent” and called “the evidence insufficient so as to preclude a second trial, even though the evidence is technically sufficient.” Note, *Tibbs v. Florida: The Weight-Sufficiency Distinction Gains Too Much Weight*, 16 Ind. L. Rev. 727, 748 n. 154 (1983). Cf. *Tibbs v. Florida*, 457 U.S. 31, 51 (1982) (White, J., dissenting) (courts may base reversal of a legally insufficient case on the weight of the evidence so that retrial will not be barred).

This decision may be one of the more blatant examples of a reviewing court erroneously labelling its subjective reweighing of the evidence as evidentiary insufficiency, but it is not the only example. In *Carter v. Estelle*, 691 F.2d 777 (1982), cert. denied, 460 U.S. 1056 (1983), the State of Texas contended in a federal habeas corpus proceeding that a pre-*Burks* ruling of evidentiary insufficiency by the Texas Court of Appeals was based upon the weight rather than the sufficiency of

the evidence.⁴ See *id.* at 781, n.3. More notably, numerous federal review courts have been found to have erroneously labelled their disagreement with the weight of the evidence as evidentiary insufficiency. See e.g., *United States v. Singleton*, 702 F.2d 1159, 1165-67 (D.C. Cir. 1983); *United States v. Dixon*, 658 F.2d 181, 191-93 (3d Cir. 1981); *United States v. DeGarces*, 518 F.2d 1156, 1160 (2d Cir. 1975).⁵ Erroneous applications of the insufficiency label have been routinely overturned by federal circuit courts of appeals even where the ruling, like the decision in this case, fails to acknowledge the true basis of its reversal and the ruling's rejection of the prosecution's evidence can only be discerned from an objective review of the record. See e.g., *United States v. Martinez*, 763 F.2d 1297, 1313-14 (11th Cir. 1985); *United States v. Burns*, 597 F.2d 939, 941 (5th Cir. 1979); *United States v. Rojas*, 554 F.2d 938, 943 (9th Cir. 1977); *United States v. Cravero*, 530 F.2d 666, 670-71 (5th Cir. 1976).

⁴ The Fifth Circuit Court of Appeals refused to consider this contention and concluded that:

[W]hen a state appellate court characterizes its reversal of a jury verdict as based upon a test of evidentiary sufficiency . . . *Burks* applies at that point regardless of how a federal court might have applied *Jackson v. Virginia* [443 U.S. 307, *reh'g denied*, 444 U.S. 890 (1979)].

Carter v. Estelle, 691 F.2d 777, 783 (5th Cir. 1982), cert. denied, 460 U.S. 1056 (1983). Unlike this case which is a request for direct review of a state court's insufficiency ruling, *Carter* involved the collateral review of a state court's insufficiency ruling. See *id.* at 778.

⁵ See also *United States v. Steed*, 674 F.2d 284, 289 (4th Cir.) (en banc), cert. denied, 459 U.S. 829 (1982); *United States v. White*, 673 F.2d 299, 304-05 (10th Cir. 1982); *United States v. Varkonyi*, 611 F.2d 84, 86 (5th Cir. 1980); *United States v. Woodruff*, 600 F.2d 174, 176 (8th Cir. 1979); *United States v. Blasco*, 581 F.2d 681, 684-85 (7th Cir. 1978).

The evidentiary sufficiency standard applied in this case conflicts not only with the federal sufficiency standard, it also conflicts with the sufficiency standard utilized by other states. Numerous state courts explicitly distinguish between reversals on the weight versus the sufficiency of the evidence. See e.g., *Dorman v. State*, 622 P.2d 448, 453-54 (Alaska 1981); *Veitch v. Superior Court*, 89 Cal. App. 3d 722, 731, 152 Cal. Rptr. 822, 824-28, cert. denied, 444 U.S. 940 (1979); *People v. Johnson*, 128 Mich. App. 618, 621, 341 N.W.2d 160, 162 (1983); *People v. Ramos*, 33 A.D.2d 344, 347, 308 N.Y.S. 2d 195, 198 (1970); *State v. Allery*, 322 N.W.2d 228, 233 (N.Dak. 1982); *State v. McGranahan*, 415 A.2d 1298, 1301-1303 (R.I. 1980).

Because the *Burks* rule is not applicable to reversals based upon evidentiary weight, uniformity as to the required basis for an insufficiency ruling is necessary.⁶ Unless there is a uniform standard, state courts that do not distinguish between evidentiary weight and sufficiency will extend broader federal double jeopardy protection to defendants than that extended by both state courts that do make this evidentiary distinction and federal courts. Such an inequitable application of a federal constitutional right unduly frustrates the evenhanded administration of justice.

The issue is not whether a state review court may reweigh the evidence nor is it whether a state court may bar retrial under its own state constitution when reversals are based

⁶ In *Hudson v. Louisiana*, 450 U.S. 40 (1981), this Court established that state courts may not employ a lesser standard of evidentiary review than that used by federal courts when determining application of the *Burks* rule. See *id.* at 43-45. Conversely, state courts should not be permitted to employ a more stringent evidentiary standard than that used by federal courts for the purposes of determining application of the fifth amendment's double jeopardy clause.

upon the weight of the evidence. Instead, the issue is whether a state reviewing court may extend the federal constitution's double jeopardy clause to evidentiary reversals where the record demonstrates that the reversal was based upon the weight of the evidence. Allowing a state appellate court to erroneously label as insufficient a conviction that satisfies the federal standard of evidentiary review results in the unnecessary extension of the *Burks* rule to cases where retrial does not offend the double jeopardy clause. Just as a federal reviewing court is not permitted to mislabel a legally sufficient conviction as insufficient, a state appellate court should not be permitted to do so.

Allowing a state court to *reverse and immunize* a defendant when the record shows there is ample evidence to support his guilt not only unnecessarily frustrates proper law enforcement, it also brings the danger that the criminal law and the administration of justice will be brought into public contempt. This danger can only be avoided if the *Burks* rule is limited to those cases where the prosecution's failure is clear. Whether the *Burks* rule should be applied to insufficiency reversals that are not based upon the federal standard of evidentiary review is a question of constitutional importance that needs to be addressed by this Court.

II. THE DECISION'S IMPLICIT RULING THAT THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE BARS REVIEW OF POST VERDICT RULINGS OF INSUFFICIENCY CONFLICTS WITH DECISIONS BY THE FEDERAL CIRCUIT COURTS OF APPEALS AND RAISES AN ISSUE OF FEDERAL CONSTITUTIONAL IMPORTANCE.

The decision below dictates the conclusion that the Minnesota Supreme Court determined that the fifth amendment bars government appeals of post verdict insufficiency rulings. This question was raised by the State of Minnesota in its petition for rehearing (Pet. App. I41-45) but was not directly ruled upon by the Minnesota Supreme Court in its denial of the petition. That the court implicitly ruled that insufficiency rulings are not reviewable is demonstrated by its reversal without remand *and* its refusal on rehearing to examine previously overlooked evidentiary exhibits. Only if the double jeopardy clause bars further review could the court's adamant refusal to examine the evidence be justified.

The Minnesota Supreme Court's implied ruling conflicts with rulings by twelve of the federal circuit courts of appeals. These courts have repeatedly held that the double jeopardy clause does not bar government appeals of post verdict rulings of evidentiary insufficiency. *See e.g., United States v. Martinez*, 763 F.2d 1297, 1311 (11th Cir. 1985); *United States v. Singleton*, 702 F.2d 1159, 1161-62 (D.C. Cir. 1983); *United States v. Steed*, 674 F.2d 284, 285-86 (4th Cir.) (en banc), cert. denied, 459 U.S. 829 (1982); *United States v. Forcellati*, 610 F.2d 25, 30 (1st Cir. 1979), cert. denied, 445 U.S. 944 (1980); *United States v. Jones*, 580 F.2d 219, 221-22 n. 3 (6th Cir. 1978); *United States v. Calloway*, 562 F.2d 615, 616-17 (10th Cir. 1977); *United States v. Cahalane*, 560 F.2d 601,

603, n. 2 (3d Cir. 1977), cert. denied, 434 U.S. 1045 (1978); *United States v. Allison*, 555 F.2d 1385, 1387 (7th Cir. 1977); *United States v. Rojas*, 554 F.2d 938, 941-42 (9th Cir. 1977); *United States v. Donahue*, 539 F.2d 1131, 1133-34 (8th Cir. 1976); *United States v. Cravero*, 530 F.2d 666, 669 (5th Cir. 1976); *United States v. DeGarces*, 518 F.2d 1156, 1159 (2d Cir. 1975).

Prosecution appeals of post verdict insufficiency rulings is consistent with previous double jeopardy decisions by this Court. See e.g., *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980); *United States v. Wilson*, 420 U.S. 332, 344-45 (1975). But this Court has never directly ruled that appeals from post verdict acquittals are permissible under the double jeopardy clause. A decision by this Court in this case would resolve this conflict. A holding that such appeals are constitutionally permissible would clearly authorize reconsideration of evidence by reviewing courts and enable prosecutors to seek the correction of insufficiency rulings that are based upon an incomplete review of the evidentiary record.

CONCLUSION

The decision below conflicts with the evidentiary review standards applied by other courts. It presents substantial questions that have not been, but should be, decided by this Court. The Court should grant the writ to resolve the conflicts and consider the substantial questions presented.

Respectfully submitted,

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